IN THE

Supreme Court of the United States

October Term, 1940

No. 19.

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA,

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

WM. B. MCKESSON,
Deputy County Counsel.
1100 Hall of Records, Los Angeles,

ALLEN W. ASHBURN,
1020 Edison Building, Los Angeles,

MICHAEL G. LUDDY,
[illegible] Citizens National Bank Bldg., Los Angeles,
Attorneys for Respondent.

Of Counsel:

ARNOLD PRAEGER,

J. H. O'CONNOR,
County Counsel.

DOUGLAS DECOSTER,
Chief Deputy County Counsel.

S. V. S. PRICHARD,
Assistant County Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Statement 1

The narrow issues of the case 1

The nature of the guarantee of free speech 2

I.

Reasonable tendency to influence or interfere with a pending proceeding is the only accepted criterion 8

The danger doctrine is not essentially different from the reasonable tendency rule 18

Petitioner's latest differentiation between danger and tendency 23

II.

As now defined by this court the present danger doctrine is inherently inapplicable to contempt 26

III.

Reasonable tendency to interfere with a pending court proceeding is a long established common law standard which does not lack requisite certainty 30

Cantwell v. Connecticut is not opposed to respondent's position 31

Authorities such as Herndon v. Lowry do not support petitioner's contention 32

Petitioner's misplaced argument as to finality 35

IV.

Actual obstruction of the court proceding is not a constitutionally acceptable test of contempt 39

V.

This proceeding presents no federal question 45

The common law of two hundred years duration cannot be a denial of due process 46

Large implications of recognition of federal question here 48

Writ should be dismissed 49

PAGE

VI.

The sufficiency of the evidence to sustain the conviction is not open to review here 50

VII.

The publication in question was contemptuous according to any suggested standard 55

The clear and present danger to the independence of the Los Angeles Superior Court 56

The factual background of the telegram 60

Summary of evidence 67

Authority of Bridges' publicity agent 72

The preparation of the telegram 74

Petitioner's intent that telegram be published 75

The inherently obstructive quality of the published telegram 81

VIII.

Petitioner has not been denied his constitutional right to petition the government for a redress of grievances 83

The telegram was not a petition for redress 83

The historical connotation of the right to petition for redress of grievances 87

The only permissible petitions affecting pending court causes are those prescribed for use of the parties 89

The telegram is to be measured by the free speech guaranty, not that relating to petitions for redress 93

IX.

The right of petitioner to pursue a lawful occupation has not been denied or impaired 98

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Adams v. Tanner, 244 U. S. 590	100
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389	2, 51
Allen v. Indus. Acc. Com., 3 Cal. (2d) 214	56
American Ry. Exp. Co. v. Kentucky, 273 U. S. 273	2
Anonymous case, 2 Ves. Sen. 520, 28 Eng. Rep. 332	9
Arnold, In re, 204 Cal. 175	93
Associated Press v. National Labor Rel. Bd., 301 U. S. 133	101
Barreiro, Estate of, 125 Cal. App. 752	56
Blythe, In re, 108 Cal. 124	56
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194	56
Bulcke v. Superior Court, 14 Cal. (2d) 510	58
Cantwell v. Connecticut, 2 Atl. (2d) 535 (126 Conn. 1), 310 U. S. 296	4, 31, 54
Charlton's case, 2 My. & Cr. 316, 40 Eng. Rep. 661	11
City of Los Angeles v. Abbott, 217 Cal. 184	56
Cline v. Frink Dairy Co., 274 U. S. 445	30
Converse, Ex parte, 137 U. S. 624	45
Davis v. Beason, 133 U. S. 333	4
Debs, re, 158 U. S. 595	49
Debs v. United States, 249 U. S. 211	20
De Jonge v. Oregon, 299 U. S. 353	86
Dunbar v. New York, 251 U. S. 516	46
Erie R. Co. v. Tompkins, 304 U. S. 64	34, 46
Fox v. Washington, 236 U. S. 273	30
Francis v. People, 11 Fed. (2d) 860 (3rd C. C. A.)	15
Froelich v. United States, 33 Fed. (2d) 660 (8th C. C. A.)	15
Frohwerk v. United States, 249 U. S. 204	20

PAGE

Gay v. Gay, 146 Cal. 237 56
Gitlow v. New York, 268 U. S. 652 ..... 22, 33, 43
Gompers v. Buck's Stove & R. Co., 221 U. S. 419 85
Gould, Ex parte, 99 Cal. 360 74
Grayson v. Harris, 267 U. S. 352 ..... 2, 52

Hague v. Com. for Industrial Organization, 307 U. S. 496 86
Herndon v. Lowry, 301 U. S. 242 ..... 29, 30, 32, 33, 34, 38, 54
Hollenbach v. Schnabel, 101 Cal. 312 56
Hotaling v. Superior Court, 191 Cal. 501 ..... 19, 74
Howat v. Kansas, 258 U. S. 181 85
Huggonson's case, 2 Atk. 469, 26 Eng. Rep. 683 ..... 8, 10, 12

Independent Publishing Co., In re, 240 Fed. 849 ..... 6, 15, 37
International Harvester Co. v. Kentucky, 234 U. S. 216 30

Jackman v. Rosenbaum Co., 260 U. S. 22 47

Meyer v. Nebraska, 262 U. S. 390 100
Minersville School District case, 84 L. Ed., Adv. Op. 4, 5, 25, 29, 34, 47
Minor v. Happersett, 88 U. S. 162 46
Morehead v. New York ex rel. Tipaldo, 298 U. S. 587 2

Nash v. United States, 229 U. S. 373 30
Near v. Minnesota, 283 U. S. 715 ..... 4, 8
Nixon v. State, 207 Ind. 426 29
Norris v. Alabama, 294 U. S. 587 54

Otis v. Superior Court, 148 Cal. 130 49
Ownbey v. Morgan, 256 U. S. 111 47

Palko v. Connecticut, 302 U. S. 325 ..... 3, 86, 70
Patterson v. Colorado, 205 U. S. 460 ..... 2, 8, 10, 13, 26, 35, 49, 54

PAGE

People v. Wilson, 64 Ill. 195 43
Pierce v. United States, 252 U. S. 239 21
Pierre v. Louisiana, 306 U. S. 354 54

Respublica v. Oswald, 1 Dall. 319, 1 L. Ed. 155 ..... 8, 12
Rex v. Joliffe, 4 T. R. 285, 100 Eng. Rep. 1022 10
Rex v. Tibbits, L. R. 1 K. B. 77 ..... 10, 43
Reynolds v. United States, 98 U. S. 145 ..... 4, 5, 25
Russell v. United States, 86 Fed. (2d) 389 (8th C. C. A.) 85

Schaefer v. United States, 251 U. S. 466 21
Schenck v. United States, 249 U. S. 47 ..... 13, 22, 40
Schneider v. State, 308 U. S. 147 4
Schomer v. R. L. Craig Co., 137 Cal. App. 620 56
Sevier Commission Co. v. Wallowa Natl. Bank, 287 U. S. 575 49
Sewell v. Johnson, 165 Cal. 762 56
Shortridge, In re, 99 Cal. 535 ..... 6, 35, 46
Shuler, In re, 210 Cal. 377 ..... 28, 29, 37, 46, 56, 101
Sinclair v. United States, 279 U. S. 763 ..... 15, 23, 41, 49
Skipworth's case, L. R., 9 Q. B. 230 11
Snowden v. Red River etc. Dist., 284 U. S. 592 49
State v. American News Co., 64 S. D. 385 ..... 12, 29
State v. Bee Publishing Company, 60 Neb. 282, 83 N. W. 206 82
State v. Butterworth, 142 Atl. 57 (N. J.) 86
State v. Owens, 125 Okla. 66 4
State Bank v. Houston Pasture Co., 247 U. S. 240 2
Stolen, In re, 193 Wis. 627 91

Thornhill v. Alabama, 310 U. S. 88 ..... 4, 2, 6, 28, 29
Toledo Newspaper Co. v. United States, 247 U. S. 402 ..... 3, 6, 8, 13, 23, 36, 39, 41, 80, 85
Truax v. Raich, 239 U. S. 33 100

PAGE

Twining v. New Jersey, 211 U. S. 106.....16, 17, 45, 49, 90
Tyler, Matter of, 64 Cal. 434..... 15

United States v. Cohen Grocery Co., 255 U. S. 81..... 30
United States v. Cruickshank, 92 U. S. 542..... 86
United States v. French, 9 Fed. Supp. 30 (D. C. Mich.)..... 85
United States v. Sanders, 290 Fed. 428 (D. C., W. D. Tenn.) 15
United States v. Shipp, 203 U. S. 563..... 85
United States v. Sullens, 36 Fed. (2d)230 (D. C. Miss.)..... 15

Van Dyke v. Superior Court, 24 Ariz. 508..... 37

Wahlenmaier v. Superior Court, 14 Cal. (2d) 799..... 58
Washington etc. Co. v. National L. Rel. Bd., 301 U. S. 142..... 2
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86..... 30
Whitney v. California, 274 U. S. 357..... 23
Wood v. Kennedy, 117 Cal. App. 53..... 56

STATUTES.

California Constitution, Art. I, Sec. 4..... 5
California Constitution, Art. I, Sec. 9..... 5
California Constitution, Art. VI, Sec. 10..... 29
Code of Civil Procedure, Sec. 1209, Subd. 13..... 2

28 United States Code, Annotated, Sec. 385..... 12

TEXTBOOKS AND ENCYCLOPEDIAS.

11 American Jurisprudence, Sec. 325, p. 1120..... 90
12 American Jurisprudence, Sec. 31, p. 413..... 37

1 Bill of Rights, No. 1, p. 74..... 3

28 Columbia Law Review, p. 401, "Contempt by Publication," by Nelles and King..... 14
12 Corpus Juris, Sec. 1100, p. 1287..... 4

PAGE

13 Corpus Juris, Sec. 44, p. 34 15
16 Corpus Juris, Sec. 28, pp. 67-68 30
36 Corpus Juris, Sec. 219, p. 1248 94
16 Corpus Juris Secundum, Sec. 212, pp. 625-7 100
16 Corpus Juris Secundum, Sec. 708b, p. 1492 4
17 Corpus Juris Secundum, Sec. 30, p. 41 15
17 Corpus Juris Secundum, Sec. 30b, p. 44 37
22 Corpus Juris Secundum, Sec. 24a, pp. 70-73 30
Fox on Contempt of Court, p. 1 6
37 Harvard Law Review, p. 1010, "Power of Congress Over Procedure in Criminal Contempts," by Profs. Frankfurter and Landis 4, 14
1 Holdsworth's History of English Law, p. 359 88
1 May on The Constitutional History of England, pp. 349-354 89
Oswald on Contempt of Court, p. 6 11
Oswald on Contempt of Court, p. 93 43
6 Ruling Case Law, Sec. 21, p. 509 15
6 Ruling Case Law, Sec. 25, p. 512 37
6 Ruling Case Law, Sec. 252, p. 267 100
17 Ruling Case Law, Sec. 90, p. 344 94
San Francisco Chronicle, 1 Cal. (2d) 637 ..... 43, 46, 82

IN THE

Supreme Court of the United States

October Term, 1940

No. 19.

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

This document is submitted as a supplement to the "Brief for Respondent in Opposition to Petition for Writ of Certiorari" heretofore filed herein, and not as a substitute.

Statement.

The Narrow Issues of the Case.

By the petition, supporting brief and additional brief petitioner has reduced this case to these questions: (1) whether rejection of "clear and present danger" and "actual obstruction" in favor of the "reasonable tendency" criterion is a denial of due process of law or equal protection of the laws; (2) whether petitioner has been denied the right of petition for redress of grievances,

(3) or the right to pursue a lawful occupation, and (4) whether the evidence is sufficient to warrant a holding that the conviction of petitioner was not merely "an arbitrary pretense for an arbitrary punishment" of "innocent conduct" (Mr. Justice Holmes in *Patterson v. Colorado*, 205 U. S. at 460) or, as elsewhere phrased, "mere arbitrary or capricious exercise of power" (*American Ry. Exp. Co. v. Kentucky*, 273 U. S. at 273).[1]

All other questions, such as the constitutionality of Subd. 13, Sec. 1209, California Code of Civil Procedure, right to jury trial, and argument based upon Sir John Fox's criticism of the procedural phases of *Rex v. Almon*, have been waived. Review upon certiorari is confined to the points raised in the petition.[2]

The Nature of the Guarantee of Free Speech.

Solemn warnings that freedom of speech and of the press must be preserved as a bulwark of our liberties, a defense and an offensive against totalitarianism, do not advance the argument very far. We are still left with the problem of delimiting the bounds of such freedom.

---

[1]This court will not review the evidence to determine whether it is sufficient to convict under the reasonable tendency rule or whether Bridges personally caused the publication of excerpts from his telegram. Those are state court questions upon which the findings below are binding (*Grayson v. Harris*, 267 U. S. 352, 357; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 397). Only in the event of rejection of the reasonable tendency criterion will it become necessary for this court to review the sufficiency of the evidence to determine, as suggested by petitioner (Br. pp. 21, 24, 38), whether the clear and present danger test or the actual obstruction doctrine, if applied to his published utterances, would disclose a legitimate exercise of free speech. This matter is discussed at pages 50-54, *infra*.

[2]*Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 604-5; *State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242; *Washington, e.c. Co. v. National L. Rel. Bd.*, 301 U. S. 142, 146.

Respondent and respondent's counsel[3] are as much interested as petitioner in preserving that freedom in the sense which is "implicit in the concept of ordered liberty";[4] but to preserve that sort of freedom it is necessary to uphold "the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends", for "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."[5]

Petitioner has not embraced Mr. Justice Edmonds' thesis that contempts are immune to punishment merely because they are perpetrated through the columns of a newspaper. He concedes that freedom of the press or freedom of speech is not an absolute right or liberty. Counsel say: "That the courts have the authority and the obligation to safeguard themselves from obstructions, interferences and outside influences concerning pending cases, is equally settled" (Br. p. 16) and "Interferences with the judiciary admittedly constitute 'substantive evils', which the courts may constitutionally prevent by appropriate measures" (Br. p. 17).

Thus the process of balancing individual liberties against public interests, the obligation to "reconcile the

---

[3]"The earliest record of a local bar assocation in the field of civil liberties is that of the Committee on Constitutional Rights of the Los Angeles Bar Association. This committee was organized about ten years ago in 1930" (Bill of Rights Review, Vol. I, No. 1; p. 74).

[4]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. at 325.

[5]*Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419.

conflicting claims of liberty and authority"[6] (finding early recognition in *Reynolds v. U. S.*, 98 U. S. 145, and *Davis v. Beason*, 133 U. S. 333, the *Mormon Church* cases, and continuously pursued by this court)[7] is conceded to be necessary in matters of contempt of court as in other governmental affairs.

The conception of independent courts, uninfluenced by extraneous forces, is so deeply rooted in our constitutional system that a specific guaranty has seldom been deemed necessary;[8] but it is fundamental and is recognized as a public necessity which the guaranty of free speech or freedom of the press cannot be permitted to impair.

Counsel supporting petitioners in the *Times* case (No. 64) cite the treatise on "Power of Congress Over Procedure in Criminal Contempts," etc. (*37 Harv. L. Rev.* 1010), by Professors Frankfurter and Landis. The authors say, at page 1020:

> "At the time of the framing of the Constitution a few basic ideas, more or less definite, had clustered around the very notion of a court. Naturally enough, the Supreme Court, as occasion arose, inferred these

---

[6]*Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 994 (not yet published in official reports).

[7]See: *Near v. Minnesota*, 283 U. S. 697, 715; *Schneider v. State*, 308 U. S. 147, 160; *Thornhill v. Alabama*, 310 U. S. 88, 96; *Cantwell v. Connecticut*, 310 U. S. 296, 303-4, 310; and lastly, *Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 995-6.

[8]It first found expression in Magna Charta, and has been carried into several state constitutions. See 12 *C. J.*, Sec. 1100, p. 1287; 16 *C. J. S.*, Sec. 708b, p. 1492; *State v. Owens*, 125 Okla. 66, 75.

ideas from the term 'Courts' and thereby, for practical purposes, wrote them into the Constitution.

"These limiting conceptions may be thus defined: * * * (2) Independence of judgment must be left to the court in cases where it may decide."

Freedom of speech rests on no higher plane than religious liberty, "an interest inferior to none in the hierarchy of legal values" (*Minersville School District* case, 84 L. Ed. Adv. Op., at p. 996). The court in the *Minersville* case, by reference to the *Reynolds* decision and other cited authorities, showed that the external exercise of religious liberty has always been required to yield to the demands of public authority reasonably exercised. At page 996 the court further said:

> "In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom."[9]

---

[9]The California Constitution expressly recognizes the proper limitations of all these fundamental liberties. Sec. 9, Art. I, says: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *" And Sec. 4 of Art. I: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; * * * but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

The introduction to Sir John Fox' excursion into the realms of procedural antiquity in contempt matters (*Fox on Contempt of Court*) says this, at page 1: "The punishment of contempt is the basis of all legal procedure * * *."

And the California Supreme Court: "Liberty of the press stops where a further exercise would invade the rights of others. This provision of the Constitution does not authorize a usurpation of the functions of the courts" (*In re Shortridge*, 99 Cal. at 535). The Circuit Court of Appeals for the Ninth Circuit:

> "Liberty of the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice. 6 R. C. L. 510, Sec. 22." (*In re Independent Publishing Co.*, 240 Fed. 849, 861.)

And this court, in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419:

> "2. The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.
>
> "We might well pass the proposition by because to state it is to answer it, since it involves in its very

statement the contention that the freedom of the press is the freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."

By way of delimiting the bounds of these liberties (freedom of speech and of the press) in their relation to the courts, the common law has long defined as a transgression from exercise to abuse any communication uttered outside a court proceeding under circumstances giving it a reasonable tendency to exercise an influence upon the pending cause over and above that of evidence and argument adduced in open court.

I.

Reasonable Tendency to Influence or Interfere With a Pending Proceeding Is the Only Accepted Criterion.

This test is of indubitable antiquity: it came to us as part of the common law at the formation of the nation. Mr. Chief Justice Hughes, after examining "the historic conception of the liberty of the press", said in *Near v. Minnesota*, 283 U. S. at 715:

> "But it is recognized that punishment for the *abuse*[10] of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

In addition to the *Patterson* and *Toledo* cases this statement was fortified by citation of *Huggonson's Case*, 2 Atk. 469, 26 Eng. Rep. 683; *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155, and numerous early state cases (in footnote 5).

Huggonson's Case (also known as *Roach v. Garvan*) was decided in 1742 and announced the reasonable ten-

---

[10]All italics ours, unless otherwise indicated.

dency doctrine. Lord Hardwicke there said, in part (p. 683):

> "Lord Chancellor. Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard. (Vide Baker v. Hart, post. 488. Mrs. Farley's case, 2 Ves. 520.)"

At page 685:

> "There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.
>
> "There cannot be anything of greater consequences than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.
>
> * * * * * * *
>
> "There are several other cases of this kind; one strong instance, where there was nothing reflecting upon the court, is the case of Captain Perry, who printed his brief before the cause came on: the offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel, but the contempt of this court was prejudicing the world with regard to the merits of the cause before it was heard.
>
> "Upon the whole, there is no doubt but this is a contempt of the court."

The same doctrine was announced and applied in the *Anonymous Case*, reported in 2 Ves. Sen. 520, 28 Eng. Rep. 332, which was decided in 1754, and in *Rex v.*

Jolliffe, 4 T. R. 285, 100 Eng. Rep. 1022, decided in 1791. And this is still the law of England.

Rex v. Tibbits, L. R. (1902), 1 K. B. 77, 85-89, reaffirms Lord Hardwicke's opinion in *Huggonson's Case* and says, in part (p. 88):

> "It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: See Reg. v. Grant. (1) We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from the influence upon the minds of the jurors at the trial of such articles as these justifies their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity and, indeed, its chief foundation would

> appear to be a confusion between the course of justice and the result arrived at. A person accused of crime in this country can properly be convicted in a court of justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence."

In deciding that the fact of actual influence or obstruction is immaterial the court reaffirmed the doctrine of *Charlton's Case*, 2 My. & Cr. 316, 342, 40 Eng. Rep. 661, 671 (1837), and *Skipworth's Case*, L. R., 9 Q. B. 230, 235-238 (1873).

Oswald on "*Contempt of Court*," an English work, says, at page 6:

> "To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation."

And at page 92:

> "Generally, comments on a cause, written and published, spoken or threatened, while it is pending, and prejudicing, or calculated to prejudice, any party, and particularly paragraphs in newspapers having

> that effect are contempts; but speeches or sermons are equally liable to be punished."[11]

At page 93:

> "The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."[12]

So much for the English law. The *Respublica* case[13] was decided in 1788; it marked out the pathway which has been constantly followed in the Federal Courts (except as temporarily influenced by the Statute of 1831, which has been codified as 28 U. S. C. A., Sec. 385) and in the courts of the various states.[14] It announced and applied the reasonable tendency test (p. 326 or 159) which was later so ably stated by Mr. Justice Holmes in *Patterson v. Colorado* as follows:

> "In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjuror, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. *The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court,*

---

[11]The author here cites a long list of English decisions, starting with *Huggonson's Case*.

[12]Citing English cases.

[13]1 Dall. 319, 1 L. Ed. 155.

[14]Except petitioners' case of *State v. American News Co.*, 64 S. D. 385, which is distinctly contrary to the great weight of authority.

and not by any outside influence, whether of private talk or public print.

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, *as tending toward such an interference*, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."[15]

The doctrine of the *Patterson* case was adopted and applied by the court in *Toledo Newspaper Co. v. United States*,[16] wherein it was said:

"True, it is urged that although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated, in a daily paper having a large circulation, as it was not

---

[15]205 U. S. at 462.

[16]247 U. S. at 421. Mr. Justice Holmes, who dissented in this case, did not question this as the common law; he concerned himself with the proper construction of the 1831 statute and its successors and did not bring forth his clear and present danger doctrine until he spoke for the court in *Schenck v. U. S.*, 249 U. S. 47, which was decided at the following term and was not a contempt proceeding.

shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is *controlled by the reasonable tendencies of the acts done, and not by extreme and substantially impossible assumptions on the subject.* Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications, and therefore there was no proof tending to show the wrong complained of. But here again, not the influence upon the mind of the particular judge is the criterion, *but the reasonable tendency of the acts done to influence or bring about the baleful result is the test.* In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, *the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case.* The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."[17]

---

[17]Criticisms have been aimed at this opinion in Frankfurter and Landis' "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts", 37 Harv. L. R. 1010, and Nelles and King's "Contempt by Publication", 28 Col. L. R. 401, both of which are cited by petitioners in the *Times* case, No. 64. But these commentaries are concerned with the procedural aspects of the decision. Neither treatise challenges the soundness of the reasonable tendency rule except as the authors conceive it to have been impaired for Federal Court purposes by the Statute of 1831. In fact, Mr. Hanson quotes the Harvard Law Review article as recognizing that "the courts must be 'invested with incidental powers of self-protection'." (Hanson's Br., p. 23; *Times* case, No. 64.)

This language was reiterated and applied in *Sinclair v. U. S.*, 279 U. S. at 763-4,[18] and by the California Supreme Court at bar [R. 157].

And this has been the law of the State of California at all times. There has been no contrary pronouncement. For an early case which voiced this view, see *Matter of Tyler*, 64 Cal. 434, 438.

The Supreme Court said at bar, with respect to the "clear and present danger" and similarly phrased tests:

> "It is sufficient to say in answer to petitioner's contention that none of these tests has been applied by the courts of this state, and that neither the Patterson nor the Sinclair case, which are in accord with the decisions of the courts of this state, has been overruled by the court in which they were rendered. We are, therefore, content to rest our decision upon the 'reasonable tendency' test in determining whether the publication or act done constituted a contempt of court" [R. 158].

Discussing the claim that the courts have no inherent power to deal with constructive contempt, the court said:

> "On the other hand, he (petitioner) concedes that the rule of law enunciated in our former decisions,

---

[18]And see: *United States v. Sanders*, 290 Fed. 428, 432 (D.C. W.D. Tenn.); *United States v. Sullens*, 36 Fed. (2d) 230, 237-8 (D.C. Miss.); *In re Independent Publishing Co.*, 240 Fed. 849 (9th C.C.A.); *Francis v. People*, 11 Fed. (2d) 860, 865 (3rd C.C.A.); *Froelich v. United States*, 33 Fed. (2d) 660, 663 (8th C.C.A.); 6 *R. C. L.*, Sec. 21, p. 509; 13 *C. J.*, Sec. 44, p. 34; 17 *C. J. S.*, Sec. 30, p. 41.

> and reaffirmed so positively and definitely in the San Francisco Chronicle case, and other recent cases, is now and for years past has been the law in the state respecting publication of articles contemptuous in their character, even though not made in the presence of the court" [R. 148].

And:

> "From the foregoing it will appear that the overwhelming weight of authority in this country supports the decision of this state rendered in the San Francisco Chronicle case, and those cited in that opinion" [R. 151].

These doctrines were incorporated in the *Times* decision [R. 122, No. 64].

Petitioner should be able to advance some overwhelming reason as a basis for urging this court to reverse itself and then impose his new concept upon the State of California as the only permissible avenue for protecting the independence of its local courts. Indeed, he should be able to furnish an affirmative answer to the query whether his "present danger" doctrine "is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining v. New Jersey*, 211 U. S. at 106.)

But no such controlling reason is disclosed. It is conceded inferentially that this new standard of clear and

present danger has never found its way into the law of contempt.

Though garbed in generalities and bedecked with felicitous phrases garnered from opinions of this court dealing with dissimilar situations, petitioner's argument for rejection of the reasonable or inherent tendency doctrine, stripped of ornamentation, appears to be the same as that of counsel for the Times-Mirror Co., namely, that the clear and present danger doctrine *should be* now incorporated into the contempt law because, so counsel assert, reasonable tendency (which has been found a workable standard in England and the United States for the past two hundred years) is too vague to comply with the requirements of due process, whereas "clear and present danger" possesses all of the necessary elements of certainty.

> "A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted." (Railroad Com. v. Rowan & Nichols Oil Co., 84 L. Ed. (Adv. Op.) at 985.)
>
> "Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." (*Twining v. New Jersey*, 211 U. S. at 106-7.)

The Danger Doctrine Is Not Essentially Different From the Reasonable Tendency Rule.

We showed in our former brief that the doctrines are essentially one (pp. 19-26); that the protagonists of the proffered standard cannot define it in terms of contempt so as to exclude the tendency concept (p. 20); and that each test presents in its application a question of fact depending for solution upon determining a matter of degree (pp. 21-23)—degree of tendency to interfere or of danger of interference.

The later brief of petitioner reflects the same difficulty. Inveighing against the accepted standard counsel term it variously as "dangerous tendency" (Br. p. 9), "dangerous and inherent tendency" (Br. p. 10) and, indeed, they indicate that they were unable to show the California Supreme Court any difference, for in the footnote to Brief page 15 they say: "The court below erroneously, and, we believe, inadvertently stated that the petitioner was relying upon the 'inherent and dangerous tendency' rule [R. 158]."

Counsel in the *Times* case say, of the application of clear and present danger to contempt, that "All that need appear is that an immediate and serious interference with a court proceeding * * * was to be expected" (p. 16). It has been repeatedly held that a publication tending to influence a pending proceeding is an interference with it. We apprehend that what they mean is that the tendency to interfere should be so "immediate and serious" that success in influencing the proceeding "was to be expected". In other words, as they now define it, their rule merely calls for a clearer case of tendency—for a difference in degree.

But when it is remembered that a conviction can be had only upon evidence convincing the trial judge beyond reasonable doubt [R. 47; *Hotaling v. Superior Court*, 191 Cal. 501, 505] of the obstructive quality of the publication, this difference in degree of danger hardly suffices to upset the common law of centuries past or to impel a declaration by this court that its application to petitioner is a denial of due process.

And speaking of these questions of degree, what in the last analysis is the difference between a *present danger* of publications working "interferences and outside influences concerning pending cases" (Br. p. 16) and an *inherent tendency* of such publications to bring about such "interferences and outside influences"?

An analysis of the decisions discloses that the authors of the danger rule conceived no difference between it and reasonable tendency; that there was immanent in their exposition of the doctrine a recognition of the fact that a reasonable or inherent tendency to accomplish a harmful result presents a present danger thereof.

When the doctrine was first announced by Mr. Justice Holmes in the *Schenck* case,[19] he and the rest of the court held that the standard had been met by a document which would reasonably be expected to influence persons subject to the draft. "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be *expected to have* upon persons subject to the draft *except to influence them* to obstruct the carrying of it out" (p. 51). This was in response to this contention:

---

[19]249 U. S. 52.

"But it is said, suppose that that was the *tendency* of this circular, it is protected by the 1st Amendment to the Constitution" (p. 51). Explaining that "It is a question of proximity and degree", the learned jurist found that the tendency of the document was enough to meet the danger test and in that connection specifically rejected the actual obstruction criterion (p. 52).

In *Frohwerk v. United States*, 249 U. S. 204, an espionage case dealing with newspaper publishers, Mr. Justice Holmes again applied the danger doctrine, saying at page 209:

> "But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame, and that the fact was known and relied upon by those who sent the paper out;"

and held the tendency in the particular circumstances to be enough.

Debs v. United States, 249 U. S. 211, held that the present danger standard had been met, Mr. Justice Holmes saying in part at page 216:

> "Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words *tending to obstruct* the recruiting service, he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words

> used had as their *natural tendency and reasonably probable effect* to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind."

In *Schaefer v. United States*, 251 U. S. 466, another newspaper espionage publication case, the court, speaking through Mr. Justice McKenna, referred to the *Schenck* case as affording the proper criterion of guilt and, concerning its application to the publications in question, said at page 479:

> "Their effect on the persons affected could not be shown, nor was it necessary. The *tendency of the articles* and their efficacy were enough for offense—their 'intent' and 'attempt', for those are the words of the law, and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny."

In *Pierce v. United States*, 252 U. S. 239, plaintiff in error contended that "there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act" (p. 243). Concerning the pleadings the court, through Mr. Justice Pitney, said:

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial. There was no error in overruling the demurrer" (p. 244).

And:

> "If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have *a tendency to cause* insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged" (p. 249).

Gitlow v. New York, 268 U. S. 652, says at page 667:

> "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, *tending* to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."

And at page 671, citing the *Schenck* case as authority for the rule, said:

> "In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent."

Incidentally this case, like the *Schenck* rejected the "actual obstruction" contention. "There was no evidence of any effect resulting from the publication and circulation of the Manifesto" (p. 656).

> "And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger

from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration" (p. 669).

Dissenting in *Whitney v. California*, 274 U. S. 357, Mr. Justice Brandeis said at page 376:

> "To justify suppression of free speech there must be *reasonable ground to fear* that serious evil will result if free speech is practiced. There must be *reasonable ground to believe* that the danger apprehended is imminent."

None of the later cases throws any doubt upon the substantial identity of the reasonable tendency and the present danger tests.

Petitioner's Latest Differentiation Between Danger and Tendency.

Petitioner now suggests a superior virtue in the danger doctrine because, so counsel say, reasonable tendency has no "objective criteria" (Br. p. 6). Counsel apparently mean that the judge, in the one case, reaches his conclusion upon a consideration of proved facts and, in the other, draws it out of his own consciousness. The view finds no support in the authorities. The *Toledo* and *Sinclair* cases say:

> "But the situation is controlled by the reasonable tendencies of the acts done, and not by extreme and

substantially impossible assumptions on the subject." (247 U. S. at 421, and 279 U. S. at 764.)

Quite obviously the rule does not permit of any presumed or esoteric tendency, such as petitioner suggests.

Counsel invoke in support of this position the Virginia Statute on Religious Liberty (drafted by Thomas Jefferson) and certain passages from Schroeder on Constitutional Free Speech, which quotes statements from St. Hilary in 335 to Tunis Wortman in 1800. But these expressions do not support the contention. They relate in the main to religious liberty, deal with "*mere* expression of opinion" (Br. p. 6), and do not contend for an absolute right.

The Virginia Statute, in its reference to "their ill tendency", is concerned with the quality *per se* of religious opinions or utterances, not with the circumstances of expression. Jefferson's "Notes on the State of Virginia", quoted by Shroeder, emphasize this:

> "The legitimate powers of government extend to *such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.*"[20] (Italics by author.)

John Wickliffe in 1729, contending for religious liberty, said:

> "The Protestant Succession was established among us by the good Providence of God, for the Protection of our Religions and Civil Rights and Liberties. *Religious Liberty, or Liberty with regard to Religion, seems to consist in nothing else but thinking about Religion in what way we judge proper, and the openly*

---

[20]Schroeder's Constitutional Free Speech, p. 438.

> *avowing and expressing such Thoughts,* and worshipping God, as we judge proper. And it is a Right which every Man ought to enjoy, (and which therefore the Protestant Succession was design'd to protect) to exercise this Liberty in all Instances *not hurtful* to anybody else. Civil Liberty is a Liberty to do what we judge proper: This therefore is likewise our Right, with the same Restriction as before, that we *don't hurt* anybody else by it. * * *."[21] (Italics by author.)

This matter is made clear in *Reynolds v. United States*, 98 U. S. 145. It was there conceded that one has an absolute privilege to believe in plural marriage if he likes, but held that the practice of polygamy (the external manifestation of the belief) must yield to "the felt necessity of society".[22] The court in the *Reynolds* case, speaking of the First Amendment, said at page 164: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order", for to permit more than this "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself" (p. 167).

We cannot escape the basic rule that there are no absolute rights or liberties. And the treatises just discussed do not impinge upon the settled doctrine that utterances which have an inherent tendency to interfere with pending judicial proceedings are excesses and hence outside the aegis of free speech.

---

[21]*Id.*, p. 410.

[22]Quoting *Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) at 995.

II.

As Now Defined by This Court the Present Danger Doctrine Is Inherently Inapplicable to Contempt.

If there be any discernible and substantial difference between the two doctrines—tendency to influence and danger of influence—it becomes apparent that the latter rule is not susceptible of application to contempt; that its field for operation is political and economic discussion.

The *rationale* of the *Thornhill* decision[23] forbids application of this standard to contempt of court (even if the proper criterion were not wholly within the exclusive area of state control). The opinion carefully limits the scope of free speech and freedom of the press to the fields of political and economic discussion and shows that historically and *ex necessitate* free discussion up to the danger point cannot apply to pending litigation,—this for the basic reason previously stated by Mr. Justice Holmes:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with respect to a court."[24]

Mr. Justice Murphy said at page 95 of the *Thornhill* decision:

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields

---

[23]310 U. S. 88.

[24]*Patterson v. Colorado*, 205 U. S. at 462.

> may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

Clearly the correction of error in court proceedings is the province of the appellate tribunals, not the newspaper, the labor leader, the radio orator or the mob,—not any of the other "processes of popular government".

The real object of this freedom, as stated by the Continental Congress, is set forth at page 102 as follows:

> "The importance of this consists, besides the advancement of truth, science, morality, and arts in general in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."

Can it be that this was intended to refer to the courts? That their deliberations are to be "shamed or intimidated, into more honourable and just modes of conducting affairs"? Petitioner has not had the temerity to embrace that doctrine. Judge Wilson thus stated the obvious truths:

> "The judicial department of the government is not on a parity with its coordinate branches. The legislator and the executive may receive petitions and advice from their constituents, they may express their opinions upon any subject at any time, yet they are not disqualified from acting. This freedom is forbid-

> den ground to the judge. To learn any facts concerning a case, to discuss its merits, to hear any argument except in open court, or to express an opinion before hearing the evidence, is to disqualify him. Neither may he go upon the public rostrum, give interviews to the newspapers, or circularize the public, in explanation or in defense of his judicial acts. The reason for his decisions must appear from the decisions themselves." [R. 104, No. 64.]

The *Thornhill* opinion further says at page 102:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Is this not satisfied, as to pending litigation, by discussion after the ruling is made, by the right of recall, or refusal to reelect? It should be remembered that discussion is not necessarily deferred until the entire cause is ended; that it is improper only as to pending matters (see ruling as to Count One of the *Shuler* case, 210 Cal. at 387, and authorities cited at page 37, *infra*); and that the court found at bar that the wrong consisted in influencing not past matters but the ensuing decision which the trial judge was about to make upon the motion for new trial and kindred motions.

Mr. Justice Murphy said in the *Thornhill* opinion (p. 104):

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances of affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Never in our history until Mr. Justice Edmonds and Mr. Justice Gibson suggested it has it been thought that judicial deliberation must abide (or be subject to) the test of its merits "by competition for acceptance in the market of public opinion."[25]

Referring to such cases as *Thornhill, Herndon, Hague* and *Schneider* (and naming part of them), Mr. Justice Frankfurter said in the *Minersville School District* case (Footnote 6 on p. 998): "the Court was concerned with restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function",—thus clearly differentiating them from contempt proceedings. For the processes of popular rule were never intended to "effectively function" through direct application to judicial deliberations of a judge concerned with a pending matter. They—the processes of popular rule—are given full scope through the indubitable right to criticize any closed matter; to join as friends of the court (*e. g.*, American Civil Liberties Union and American Newspaper Publishers Association at bar) in seeking a reversal; to recall the judge; to refuse to re-elect him; to bring about his impeachment or his removal from office by legislative action (see Cal. Const., Art. VI, Sec. 10).

---

[25]Neither *State v. American-News Co.*, 64 S. D. 385, nor *Nixon v. State*, 207 Ind. 426, goes so far. The *Nixon* case related to a past matter, like count one of the *Shuler* case, 210 Cal. at 387, and the court did not reject the tendency doctrine. The *American-News Co.* case exhibits judicial palsy in the face of the power of the press. The court exonerated the defendants although it said at page 400: "The defendants by their series of publications attempted to arrogate unto themselves the administration of justice in regard to all these cases. It is unfortunate for any community when this occurs." But more unfortunate for the State of South Dakota when its Supreme Court exhibited so little courage as to exonerate the defendants from the clearly established charge of contempt with the confession that "very possibly we do" err.

III.

Reasonable Tendency to Interfere With a Pending Court Proceeding Is a Long Established Common Law Standard Which Does Not Lack Requisite Certainty.

We have, in discussing *Herndon v. Lowry*[26] in our former brief (pp. 23-26), pointed out the basic difference between a new and vague statutory measure of guilt, one not confined to "a described and defined activity of the Government", on the one hand, and a well settled common law standard "notwithstanding an element of degree in the definition as to which estimates might differ", on the other hand. To the effect that this is a well settled distinction see also 16 *C. J.*, Sec. 28, pp. 67-68; 22 *C. J. S.*, Sec. 24a, pp. 70-73. We also have shown the antiquity and uniformity of the reasonable tendency test. Its successful administration for some two hundred years or more renders presently applicable the remark of Mr. Justice Holmes, who said in *International Harvester Co. v. Kentucky*, 234 U. S. 216, at 223:

> "The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

Counsel for petitioner profess to be content to abide by "the conventional concept of 'due process of law' in all criminal prosecutions" (Br. p. 8), and the authorities cited at pages 24-26 of our former brief[27] relate in each

---

[26]301 U. S. 242.

[27]*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *Nash v. U. S.*, 229 U. S. 373; *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, 92; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459; *Fox v. Washington*, 236 U. S. 273.

instance to a criminal or *quasi* criminal proceeding and hold a common law standard not unconstitutional "merely because it throws upon men the risk of rightly estimating a matter of degree" where "a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe".

But opposing counsel make no attempt to differentiate these cases. They are merely ignored. This will scarcely suffice to read them out of the books, especially when considered in the light of the authorities cited at pages 46-48, *infra*.

Though counsel in this case do not so contend, it may be thought, and counsel for the *Los Angeles Times* obliquely suggest, that the *Cantwell* case is opposed to these authorities.

Cantwell v. Connecticut Is Not Opposed to Respondent's Position.

The *Cantwell* decision[28] is not at variance with the cases cited in our opening brief. The fifth count, under which petitioner Jesse Cantwell was convicted, charged, as shown by the report in 8 Atl. (2d) 535 (126 Conn. 1), that petitioner "did disturb the public tranquillity by certain acts or conduct inciting to violence or tending to provoke or excite others * * * to break the peace"; and the state court held that "The fifth count charges a breach of the peace by acts which are within the common-law definition of that offense" (p. 536); but this tribunal held the contrary, saying at page 309:

> "One may, however, be guilty of the offense if he commit acts or make statements *likely to provoke*

---

[28]310 U. S. 296.

> violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. * * *.
>
> "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."

And hence the court further concluded that petitioner had been convicted "on a common law concept of the most general and undefined nature" (p. 308), a mistaken concept. The opinion impliedly concedes that the common law offense of breach of the peace, correctly understood and applied, would be a sufficiently definite standard of guilt.

Authorities Such as *Herndon v. Lowry* Do Not Support Petitioner's Contention.

We have discussed that case[29] at pages 23-26 of our former brief, but counsel supporting petitioner lay so much stress upon it that it seems necessary to more clearly indicate its proper place in the jurisprudence of free speech.

None of the cases so far decided rejects "reasonable tendency" to accomplish a harmful result where that test

---

[29]301 U. S. 242.

has been prescribed by the legislature. Cases which seem to reject it in the field of political and economic affairs do so only as counsel attempt to engraft that criterion upon otherwise vague standards not permitting of that construction. As we pointed out in our former brief, that is manifestly true of the *Herndon* decision. That opinion *ex industria* makes it clear that the court was not dealing with a canon of conduct expressed with reasonable certainty and reflecting a legislative determination that such conduct is harmful because of its dangerous tendency. At page 260 it is said:

> "It is to be borne in mind that the legislature of Georgia has not made membership in the Communist Party unlawful by reason of its supposed dangerous tendency even in the remote future. The question is not whether Georgia might, in analogy to what other states have done, so declare."

This was by way of emphasis of what had previously been said concerning the *Gitlow* case:

> "It relies particularly upon Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625. There, however, we dealt with a statute which, quite unlike §56 of the Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described": (p. 256)

and, quoting that case:

> "'* * * when the legislative body had determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and

> of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition." (p. 257.)

The trouble with the Georgia Statute was that it neither reflected a common law standard nor any other rule of action sufficiently definite to serve as a standard. But the inference is irresistible that had the legislature written into the statute some common law criterion, it would have been upheld.

The contempt rule of reasonable tendency which came to us as a part of our basic jurisprudence stands on a parity with the legislative declaration of a standard of misconduct. In effect the rule declares that the proscribed utterances, because of their tendency "to obstruct a described and defined activity of the government" (*Herndon*, p. 256)—the functioning of the courts—present a present danger of a "substantive evil which the state constitutionally may seek to prevent", one "within the allowable area of state control". Like the *Herndon* case, the *Minersville School District* decision draws attention to the higher authority of rules of conduct which constitute "manifestations of specific powers of government deemed by the legislature essential to secure and maintain * * * orderly, tranquil, and free society * * *."[30] The *Erie Railroad* case (304 U. S. 64) establishes that it makes no difference whether the state has spoken through its legislature or its common law, if it has spoken with sufficient certainty.

A survey of the rulings of this court will show that the danger doctrine has not operated in any single instance to

---

[30]84 L. Ed. (Adv. Op.) at 996.

strike down a reasonable tendency standard prescribed by the legislature. In none of the cases where it was declared or applied was any statutory (or any common law) standard of reasonable tendency involved.

Petitioner's Misplaced Argument as to Finality.

Petitioner further attacks the reasonable tendency rule upon the ground that it defers all discussion of court proceedings until complete finality in the court of last resort, and that, therefore, this rule which came to us with our national freedom "strikes a foul, if not fatal, blow at the democratic, the American, way of life" (Br. p. 14).

The argument overlooks the authoritative ruling of this court that the duration of the pendency of an action for contempt purposes is exclusively a question of state law (*Patterson v. Colorado*, 205 U. S. at 460) and no longer open to discussion. But petitioner's criticism would possess no substance if the matter were to be now reexamined on its merits.

To begin with, the rule has no relation to substantially true news accounts published at any stage of the proceeding,[31] news accounts as distinguished from discussion of the merits. In the second place, the desire to publish comment or criticism or protest does not prove or create the right to do so. The critic or publisher must await finality of the particular matter because he is obligated to refrain from injecting extraneous influences into the judicial deliberations. Neither he nor his hearer or reader is entitled to debate with the judge the merits of a matter *sub judice*.

---

[31] *In re Shortridge*, 99 Cal. 526.

The argument is that litigation of public interest such as the *Mooney* case, causes involving the validity of child labor legislation, social security enactments, wage and hour laws and the like, should be open to discussion at all stages and in all places and inferentially through all types of publications. The contention overlooks the true scope of the reasonable or inherent tendency doctrine which is confined to "the reasonable tendencies of the acts done" and does not embrace "extreme and substantially impossible assumptions on the subject".[32]

Mr. Bridges may talk with Secretary Perkins all he wants about the injustice of a court decision or the proper outcome of a pending matter, but he cannot do it in the presence of the judge, nor can he send the judge a transcript of the conversation. He may issue all the circular letters to union members which seem to him proper and, if they fortuitously come to the attention of the judge, it may be that there is a causal break which absolves him from responsibility. He may hold all the union meetings which he likes and there discuss the pending litigation, but he cannot hold those meetings on the courthouse steps or in the courtroom itself, nor can he place an account of that meeting in channels which will normally and inevitably lead it into the judge's chambers.

Just as Mr. Bridges' conferences with union leaders or members lack enough kinetic energy to carry into the council chambers of the court, so does a Los Angeles newspaper, through its localized circulation, lack potentiality to interfere with the deliberations of the Supreme Court of the United States when the *Mooney* or the *Herndon* or the *Muller* or some similar case is before it,—regardless of whether it carries a message from Mr. Bridges. And

---

[32] *Toledo Newspaper* case, 247 U. S. at 421.

while an issue of the San Francisco Chronicle possesses sufficient momentum to reach the Supreme Court in San Francisco (1 Cal. (2d) 630), the same article appearing in an inconspicuous country newspaper would not have had the requisite reasonable tendency to disrupt the judicial calm of the Supreme Court of California, nor would it when appearing in the San Francisco Chronicle have sufficient momentum to reach the attention of the Justices of this high court.

Petitioner's argument is on a parity with that of the *Times-Mirror* counsel who say that finality of a murder conviction occurs only with defendant's execution because forsooth a writ *coram nobis* may lie. Such extreme arguments defeat their own purpose.

Finality is requisite, but it is finality of the matter under discussion.[33] So held as to the first count of the *Shuler* case in 210 Cal. at 387.[34] But it was likewise there held that the finality of that first phase of the cause did not warrant the discussions mentioned in the second and third counts and which related to approaching judicial action on other phases of the case. So at bar, petitioner was not convicted because of the relation of his published telegram to any concluded phase of the Walker litigation; it was because of the potential, "the inevitable", influence upon phases of the case which were still pending and which would require early action by the judge. [R. 46, 52, 155-56, 160.]

Reasonable tendency is a realistic test. It applies to publications which are so timed and circumstanced as to possess sufficient momentum to invade the judicial cham-

---

[33]See: 6 *R. C. L.*, Sec. 25, p. 512; 17 *C. J. S.*, Sec. 30b, p. 44; 12 *Am. Jur.*, Sec. 31, p. 413; *In re Independent Publishing Co.*, 240 Fed. 849, 853-4 (9th C.C.A.).

[34]*Cf. Van Dyke v. Super. Ct.*, 24 Ariz. 508, 541.

bers. Though relating to a different stage of the same cause, the question of reasonable tendency must be solved with reference to the nature and place of the utterance and its inherent momentum.

So the arguments about the *Mooney, Herndon, Muller, Powell, Norris* and *Thornhill* cases are misplaced and tend only to reflect a distorted viewpoint of petitioner.

No more potent is the claim that assumed necessity to finance impecunious but misjudged defendants connotes a right to discuss the merits in such manner as to tend to disrupt the functioning of the court wherein the cause is pending. When the matter is before the Superior Court, strangers to the litigation must let it alone; when before the District Court of Appeal or the state Supreme Court, that tribunal must not be disurbed by extraneous influences; but judges of the Superior Court, after the matter has passed to the appellate tribunal, being through with the matter, can be persuaded concerning the merits, solicited for funds to finance an appeal or otherwise addressed concerning it. And so when the California Supreme Court is done with the case, it may be heartily criticized or even libeled without answerability for contempt, but such "protests" of error cannot be lawfully mailed to the Justices of this court while the cause is here pending, nor may interested parties waylay them in the corridors or on the street to discuss the merits or to solicit funds for presentation of the matter to the court.

Reasonable tendency has a fixed meaning which, as we have shown, excludes "extreme and substantially impossible assumptions on the subject". Like clear and present danger, its application presents a question of proximity and degree. And nothing is accomplished by arguing from one factual situation to another possessing a different degree of tendency or danger.

IV.

Actual Obstruction of the Court Proceeding Is Not a Constitutionally Acceptable Test of Contempt.

Judge Bishop found that there was not only an inherent tendency in the Bridges publication "to interfere with, influence, sway and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending," but also that Bridges had, by that publication, "unlawfully interfered with the proceedings of this court." [R. 52.] If actual obstruction were of the essence, this finding of the trier of the facts would conclude the matter.

The actual obstruction principle, as advanced in petitioner's brief, connotes a communication actually exercising an influence upon the court. In this sense it may be said that Mr. Justice Holmes contended for "actual obstruction" in his dissent in the *Toledo Newspaper Company* case, but *only* as applied to the construction of the statute under consideration. For the learned justice cautioned that, "I am not considering whether there was a technical contempt at common law, but whether what was done falls within the words of an act intended and admitted to limit the power of the courts" (247 U. S. p. 424). He was discussing an act which said that the contempt power of courts should "not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." He thought the language of the statute "too plain to be construed away" and that the phrase "so near as to obstruct" meant "so near as actually to obstruct—and not merely near enough to threaten a possible obstruction." But the majority of the court differed with him and held that the publication

in the neighborhood of the court of articles *having a reasonable tendency to influence* the deliberations of the judge *constituted an actual obstruction* of the administration of justice; that "the test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty" (p. 419). Again, at page 421:

> "But here again, not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, the wrong [illegible] upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

That the learned justice abandoned the viewpoint of his dissent appears from his discussion of the clear and present danger doctrine in the *Schenck* case,[35] where he said:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are

[35]249 U. S. at 52.

the same, we perceive no ground for saying that success alone warrants making the act a crime."

But more potent evidence of the fact that Mr. Justice Holmes ultimately accepted the rationale of the *Toledo* decision is found in his concurrence in *Sinclair v. United States*, 279 U. S. 749, the jury shadowing case. The appellant Sinclair relied upon the same construction of the federal statute which Mr. Justice Holmes had advanced in the *Toledo* case:

"They challenged the sufficiency of the petition to charge anything done in the presence of the court, or near thereto, which obstructed or impeded due administration of justice, or tended so to do." (p. 753.)

"Counsel maintain that the petition does not adequately charge and the record fails to show misbehavior by appellants which obstructed the administration of justice within Sec. 268, Judicial Code, since there is neither averment nor evidence that any operative actually approached or communicated with a juror, or attempted so to do, or that any juror was conscious of observation." (p. 762.)

The court's opinion conceded that:

"The evidence does not disclose that any operative was instructed to approach, or did approach, a juror, nor does it disclose that any juror actually knew that he was being shadowed. Some were suspicious. The court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed," (p. 758)

but definitely rejected the obstruction principle, saying, at page 762:

> "The insistence is that to establish misbehavior within that section it was essential to show some act both known by a juror and probably sufficient to influence his mind. We cannot accept this view. It would destroy the power of courts adequately to protect themselves—to enforce their right of self-preservation."

The portion of the Toledo decision expounding the reasonable tendency doctrine was then quoted with approval, and the court further said, at page 764:

> "Under the doctrine so stated, we think the trial judge rightly held it unnecessary to allege or show actual contact between an operative of the detective agency and a juror, or that any juror had knowledge of being observed. The reasonable tendency of the acts done is the proper criterion. Neither actual effect produced upon the juror's mind nor his consciousness of extraneous influence was an essential element of the offense."

and

> "The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly, they were not less remote than the publication denounced in Toledo Newspaper Co. v. United

> States. There was probable interference with an appendage of the court while in actual operation; the inevitable tendency was towards evil, the destruction, indeed, of trial by jury." (p. 765.)

Here is a clear rejection of the actual obstruction principle, and Mr. Justice Holmes and Mr. Justice Brandeis, who had dissented in the *Toledo* case, joined in the ruling.

Gitlow v. New York, 268 U. S. 652, 669 is likewise directly in point; see quotation at pages 22-23, *supra*.

That this is the English rule of long standing appears from *Rex v. Tibbits* and other cases, cited at pages 10-11, *supra*. *Oswald on Contempt of Court*, citing English cases, says at page 93:

> "The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."

The distinction between tendency to influence and fact of influence is so evanescent as often to be indiscernible. The California Supreme Court in *In re San Francisco Chronicle*, 1 Cal. (2d) at 637, quoted with approval from *People v. Wilson*, 64 Ill. 195, as follows:

> "'A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental

poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Exen if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.'"

Judge Wilson further explained the impossibility of recognizing the "actual obstruction" doctrine when he said at R. 108 of No. 64:

> "If the courts are not permitted to try cases and render judgments impartially and without pressure either from newspapers, individuals, or groups of individuals, freedom of speech and freedom of publication will soon pass into oblivion. If a newspaper may suggest how a case should be determined, any person or group has the same right to suggest its ideas to the judge. Lawsuits would then be decided, not according to the weight of the evidence, but according to the weight of the influence brought to bear upon the judge, and the newspaper itself would be the victim if it had less influence than the opposing group."

See similar remarks of Supreme Court at R. 132 of *Times* case.

V.

This Proceeding Presents No Federal Question.

The matter is discussed at pages 2-12 of our former brief.

It is there shown that the definition of lawful or unlawful conduct, the erection and maintenance of independent courts, are within the exclusive keeping of the states,[36] pertaining to their internal sovereignty—subject only to the requirements of due process and equal protection of the laws.

Twining v. New Jersey, 211 U. S. 78, 106:

> "In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in Hurtado v. California, 110 U. S. 516, 527, 28 L. Ed. 232, 235, 4 Sup. Ct. Rep. 111, 292."

---

[36] See, also, *Ex parte Converse*, 137 U. S. 624, 631-2.

That due process in the procedural sense was afforded petitioners is amply disclosed by the facts and authorities reviewed at pages 6-10 of that brief.

That there was uniform application of the law appears from comparison of this case with the *Times* proceeding, as well as the *Chronicle*, *Shuler*, *Shortridge* and other cases cited by the Supreme Court. [See R. 147, 156, and R. 122, No. 64.]

The Common Law of Two Hundred Years Duration Cannot Be a Denial of Due Process.

But counsel would erect a constitutional question out of asserted error in the rule which has prevailed for two hundred years, forgetting that "no constitutional rights can be based on the error of prior decisions;"[37] also forgetting that the fourteenth "amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."[38] Indeed, the very antiquity of the reasonable tendency rule establishes its harmony with due process.

What Mr. Justice Frankfurter said about legislation and religious liberty is equally applicable here:

> "Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant.[39] * * * * Nor does the freedom of speech assured

---

[37] *Dunbar v. New York*, 251 U. S. 516, 519.

[38] *Minor v. Happersett*, 88 U. S. 162, 171.

[39] It is immaterial, of course, whether the state has spoken through its legislature or its courts defining the common law. See quotations from *Erie R. Co. v. Tompkins*, 304 U. S. 64, at pages 4-5 of respondent's initial brief herein.

by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom."

Minersville School Dist. v. Gobitis, 84 L. Ed. (Adv. Op.) at 995-6.

Mr. Justice Holmes, deciding a party wall controversy under the laws of Pennsylvania,[40] referred to the fact "that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn, and has prevailed in the state ever since" (p. 30), and held:

"The Fourteenth Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by Ozanbey v. Morgan, 256 U. S. 94, 104, 112, 65 L. Ed. 837, 843, 846, 17 A. L. R. 873, 41 Sup. Ct. Rep. 433." (p. 31.)

The cited case of *Ozanbey v. Morgan* dealt with the Delaware attachment statutes. Concerning the matter now in hand, the opinion said:[41]

"A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law. * * *

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.

---

[40] *Jackman v. Rosenbaum Co.*, 260 U. S. 22.

[41] 256 U. S. at 111-12.

> Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the states to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to make amendments. Neither does it, as we think, require a state to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Nor does the Fourteenth Amendment contain any mandate for the rejection of a time-honored criterion of contempt and substitution of a new and putatively better one.

Large Implications of Recognition of Federal Question Here.

The result of a holding that the case presents a federal question would be fraught with large consequences. We assert that the determination of the rules necessary to preserve the independence of the California state courts is solely within state competency; that no supervisory power rests in any branch of the federal government; and that substitution of a new rule for the state courts would constitute a serious impairment of the autonomy of the state; "whenever a new limitation or restriction is declared, it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government,

and changes its relation to its people and to the Union" (*Twining v. New Jersey*, 211 U. S. at 92).

The California Supreme Court has declared that "every court is the exclusive judge of its own contempts" (*Otis v. Superior Court*, 148 Cal. at 130), and this court that "this is no technical rule," for "to submit the question of disobedience to another tribunal, be it jury or another court, would operate to deprive the proceeding of half its efficiency" (*Re Debs*, 158 U. S. at 595).

If the rule of the *Patterson, Toledo, Sinclair* and similar cases is now to be abandoned, if the cogency of the evidence supporting state convictions is to be here reviewed —three thousand miles from the place of the contempt— then, indeed, are the state courts rendered impotent. Few courts have the aid of Bar Associations willing or financially able to sustain the burden of supporting for two or three years, and to the highest court in the land, its judgments. If contempt is held a federal question and the evidence reviewable, any litigious contemner will be able to frustrate the local courts; their hands will be stayed by the ever-present threat of federal review and lack of ability to pursue the matter. The truth of this assertion would be even more apparent if this court were to find itself unable or unwilling to take judicial cognizance of the local situation reviewed at pages 56-59, 81-82, *infra*.

Writ Should Be Dismissed.

We respectfully submit that the instant writ should be dismissed as one improvidently granted in the absence of a substantial federal question.[42]

---

[42] *Snowden v. Red River etc. Dist.*, 284 U. S. 592; *Sevier Commission Co. v. Wallowa Natl. Bank*, 287 U. S. 575.

VI.

The Sufficiency of the Evidence to Sustain the Conviction Is Not Open to Review Here.

The admission made concerning this matter at page 33 of our former brief is too broad.

This court, following sound precedents, will refuse to review the evidence in the instant case, subject only to the exception that, in event of rejecting the reasonable tendency criterion and substituting "present danger" or "actual obstruction," it would be called upon, as suggested by petitioner's arguments, to determine whether the evidence meets either of those standards; if petitioner is guilty according to the standard he has invoked, his conviction cannot possibly have resulted in a denial of due process or equal protection of the laws.

But if this court holds the reasonable tendency test to be consonant with constitutional requirements, that ends the case; the sufficiency of the evidence then becomes strictly a state question—a preliminary or conditional fact which is not bound up in the federal question of what criterion the Constitution demands. The federal question arises, if at all, upon the legal controversy as to the requisite standard of contempt, not upon the distinctly separate question of fact as to whether that standard has been met.

The rule that this court will review the evidence to determine for itself the existence of a federal question is limited to cases of necessity.

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, was an action upon a policy of life insurance, which resulted in favor of plaintiff. Upon writ of error the insurance company claimed that the undisputed evidence established that the policy had never become a completed or binding contract; it also raised the question of whether the same was governed by the laws of Tennessee, Connecticut or Texas. This question of conflict of laws was held to be federal. Concerning the matter of insufficiency of the evidence, the court said, at page 394:

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. * * * To this general rule there are two equally well-settled exceptions: '(1) Where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.' * * * This case comes within the general rule, and not within either of the exceptions. The fact decided is that the policy sued upon was delivered as a completed and binding contract. The federal question presented arises from the ruling of the court that the Texas, and not the Tennessee, statute controls this contract. The asserted federal right was not denied as a result of the finding of fact; nor are the conclusions in respect of the federal right and the finding interdependent, or so intermingled as to cause it to be necessary to consider the

> latter in order to pass upon the former. That the contract was effective is a fact equally consistent with the determination of the federal question either way."

This is obviously true of the finding that Bridges caused the telegram to be published.

And the fact that its publication had a certain tendency is likewise an independent fact which is equally consistent with determination of the federal question either way. If the tendency test is upheld the factual finding supports the judgment; if tendency is rejected the finding of fact falls with it, swept aside as an inconsequential incident of a void judgment. (The *finding* of reasonable tendency is swept away, but the evidence remains as a basis for further inquiry into the dangerous or obstructive quality of the editorials.)

Grayson v. Harris, 267 U. S. 352, was an action to determine title to certain lands in which plaintiffs' rights depended upon proof that they were citizens of the Creek Nation. It was claimed that this court should "review the record in that respect in order to determine whether there was any basis for the claim of federal right" (p. 357); but the court said:

> "The point that the evidence fails to show that plaintiffs in error were Creek citizens presents a pure question of fact. The trial court found they were. The state Supreme Court expressly affirmed the finding and, recognizing the existence of the federal question in the case, put its decision denying

the federal right upon an erroneous view of the law. The denial was not the result of the finding of fact, nor is that finding so intermingled with the conclusion of law in respect of the federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the federal question. * * * The effect of the finding was to establish the existence of a preliminary fact, related to the federal right only in the sense that it brought the case within the reach of the federal law relied on, and called for a determination of the federal question then presented. In other words, the finding simply established a condition, not as a basis upon which to rest a decision of the question of federal rights one way or the other, but upon which that question became an issue for consideration and determination. In such case, the ordinary rule applies that the decision of the state court upon a question of fact cannot be made the subject of inquiry here." (pp. 357-358.)

This language seems fully applicable here. The fact of Bridges' personal responsibility for the publication is on an exact parity with the finding of plaintiffs' membership in the Creek Nation. And the *fact* of the unlawful tendency of the publications relates to the federal right (the proper standard) only in the sense that it "brought the case within the reach of the federal law relied on, and called for a determination of the federal question then presented". If due process has been denied petitioner, it is because of failure to apply the proper legal standard

to the evidence, not because of the determination of the proper factual inferences to be drawn from that evidence.

Nor do we have a case where the factual finding is "so intermingled with the conclusion of law in respect of the federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the federal question". The cases of *Herndon v. Lowry*[43] and *Cantwell v. Connecticut*[44] fall within this latter category and, hence, are clearly distinguishable from the matter at bar. Those cases are cited by petitioners in the *Times* case. Counsel at bar rely upon *Norris v. Alabama*, 294 U. S. 587, and *Pierre v. Louisiana*, 306 U. S. 354.

The *Norris* ruling was expressly placed on this ground (p. 590). The *Pierre* case involved an unconstitutional application of a statute which was valid on its face. The denial of fundamental liberty occurred wholly through a factual situation whose parallel would be found here if the record showed "that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment".[45]

But if it be held that we err in this regard or that a weighing of the evidence in the light of the present danger rule is necessary, we submit that it is ample to support a conviction according to either standard.

---

[43]301 U. S. 242.

[44]310 U. S. 296.

[45]As phrased by Mr. Justice Holmes in *Patterson v. Colorado*, 205 U. S. 454, 460.

VII.

The Publication in Question Was Contemptuous According to Any Suggested Standard.

Judge Bishop said in his oral decision:

> "It was inevitable that the portions of that telegram which were published would be published if it were sent out and the ordinary course of affairs were carried through without interruption. Now, as inevitably—and there can be no argument, it seems to me, against this conclusion—that telegram, published due to its nature and due to its contents which were published, would inevitably interfere with the orderly administration of justice; not that it would cause the judge to change his mind, but it did embarrass and disturb the administration of justice and is as typical a case, it seems to me of a contempt, as several others might be, such as the Chronical case, and others." [R. 46.]

And formally adjudged:

> "* * * that, by reason of the foregoing acts, the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court, and he is guilty of contempt of court, * * *." [R. 52.]

Counsel for petitioner make no contention that such was not the effect of the publication. Tacitly they concede that the reasonable or inherent tendency standard has been met. They review the evidence to the sole end of establishing that there was no present danger of interference or actual interference.

In view of this contention we feel impelled to place before this court certain existing local conditions which are not included in our former brief herein.

The Clear and Present Danger to the Independence of the Los Angeles Superior Court.

We are about to refer to matters which were before the trial judge, of which he could and presumably did take judicial notice, and which we think this court should likewise take into consideration by application of the same doctrine, for judicial notice applies to proceedings on review as well as in the trial court.[46]

They are matters which were well known locally. The Superior Court of Los Angeles County has fifty elective judges with no party sponsorship, and the Municipal Court of the City of Los Angeles has thirty judges similarly situated. The newspaper publishers and the labor leaders of Los Angeles, respectively, believe that the re-election of these judges is largely dependent upon their approval or disapproval. They have nurtured this thought in the minds of our elective judges, many of whom hold to the same view. There are at least 1,600,000 voters in Los Angeles County and 900,000 in the city alone; the 1938 figures are comparable.

The Los Angeles Bar Association's Committee for Preservation of Judicial Independence was formed at the urgent suggestion of the presiding judge for the year 1937, and it grew out of conditions resembling those of the Shuler era[47] when Rev. Bob Shuler, through threats and flattery, was engaged in an endeavor, which for a time approached appallingly close to success, to impose

---

[46]*Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209; *City of Los Angeles v. Abbott*, 217 Cal. 184, 192, 193; *Wood v. Kennedy*, 117 Cal. App. 53, 60-61; *Estate of Barreiro*, 125 Cal. App. 752, 754; *Hollenbach v. Schnabel*, 101 Cal. 312, 315-316; *Schomer v. R. L. Craig Co.*, 137 Cal. App. 620, 627; *In re Blythe*, 108 Cal. 124, 126; *Sewell v. Johnson*, 165 Cal. 762, 768; *Gay v. Gay*, 146 Cal. 237, 241; *Allen v. Indus. Acc. Com.*, 3 Cal. (2d) 214, 215.

[47]*In re Shuler*, 210 Cal. 377.

his will upon the judges of the Superior Court concerning any litigation in which he happened to take an interest. But the more recent conditions, which were becoming progressively worse, involved a somewhat contemporaneous series of drives upon the judges by various pressure groups, such as the A. F. L. and C. I. O.; at the same time the practice of trying cases in the newspapers was growing in extent and obnoxiousness, and many attorneys were unfortunately lending themselves to the practice of giving to the newspapers advance statements of their views concerning the merits or the evidence about to be produced. A committee of one labor organization called upon the presiding judge in an effort to persuade him to replace the judge then in charge of the Order to Show Cause Department[48] with a judge whose economic and social views would be more acceptable to that organization. At about the same time one Heist, speaking on behalf of one of these labor groups, delivered over the radio a diatribe directed at the judge presiding in that department, and he mailed a copy of it to the then presiding judge. During litigation between McPherson and Crawford[49] someone mailed to each of the Superior Court judges a copy of one or more issues of a small newspaper which was freely discussing the merits of the case about to come to trial. During the *Markham* will case the Hollywood Red Ink, a newspaper (reputed to be controlled by one of the attorneys in that litigation), took such an active and partisan interest in the case that it became well-nigh impossible for the attorney for the contestee

---

[48]The department of the Superior Court which handles preliminary injunctions, special writs and the like.

[49]Litigation between Aimee Semple McPherson and Rheba Splivalo Crawford concerning the Four Square Gospel Church.

to find a judge who would act on any matter pertaining to the case, even though related to some formal phase of it. During the pendency of the litigation involving the San Pedro Hiring Hall (the *Walker* case mentioned in Bridges' telegram), telegrams from Herman Bulcke, V. Wahlenmaier and other labor leaders were received by Judge Schmidt,[50] the trial judge, seeking to influence his action upon matters such as motion for new trial, etc. And petitioner Bridges, during that same proceeding, made an affidavit which, filed by Mr. Katz, one of the attorneys for defendants, resulted in his (Katz) punishment for contempt; the judgment was upheld by the rulings of the District Court of Appeal and the Supreme Court in *Matter of Katz*, Second Civil No. 11806. Bridges also sent to the Secretary of Labor and caused the newspapers to publish pertinent portions of the telegram now under consideration.

All of these things occurred before the hearing of the *Times* case (No. 64). During its progress the semi-annual report of Judge Wilson concerning the Order to Show Cause Department was rendered to the presiding judge and revealed the fact that 41 contempt matters had been handled in that department during the six months' period; but this covered only the one department of the court, and we have no way of knowing how many additional contempt matters there were. The above mentioned instances, some of which occurred before 1938, are but outstanding examples of a growing tendency of outsiders to attempt to bring pressure upon the court to render what they conceive to be just judgments. And among the 41

---

[50]See: *Bulcke v. Super. Ct.*, 14 Cal. (2d) 510, and *Wahlenmaier v. Super. Ct.* 14 Cal. (2d) 799.

matters handled by Judge Wilson was the instance of the defiant dragging in the gutter of a copy of a temporary injunction rendered in a labor dispute, a thing which promptly became a matter of common knowledge.

While these things were occurring, most of them being attempts of the labor faction to impress their views upon the court, the Los Angeles Times, absorbing the spirit of the moment, fell into line and adopted or revived a policy of publishing editorials concerning the merits of these pending matters, again largely labor disputes; and these editorials became increasingly bold until they culminated in "Probation for Gorillas", wherein the Times directly addressed the trial judge and told him in no uncertain terms that on account of considerations of public policy (regardless of his view of the sufficiency of the evidence or the existence or gravity of errors or of extenuating circumstances) probation should be denied as an alternative to the commission of a grave mistake. The attitude of labor toward the courts had fairly indicated that there would be no hesitation in bringing pressure to bear upon the judge to grant probation to Shannon and Holmes, and it is a fair inference that the Times, foreseeing this, determined that, if within its power, it would prevent the successful exercise of that sort of influence and substitute its own judgment as that of the court. And so we have illustrated the grave evil of extramural arguments concerning pending matters. Labor, on the one hand, attempting to coerce the court into granting probation, and the Times, on the other, threatening and scolding that probation should not be granted.

If it be necessary to this proceeding to prove the existence of a clear and present danger, then we have it clearly

in the County of Los Angeles, at the time of the institution of the instant proceeding.

The Factual Background of the Telegram.

For several months prior to January 24, 1938, Presiding Judge Schmidt had been engaged intermittently in the trial of *Walker, et al., v. International Longshoremen's Association, District Local 38-82, et al.* This action, because of the parties thereto and the issues involved, attracted great public interest. Involving a controversy between representatives of rival labor organizations, more than ordinary interest was manifested by the general public in the evidence adduced and the rulings made from time to time by the court. As would be expected under such circumstances, the newspapers in Los Angeles County overlooked no opportunity to prominently display news accounts of what was happening in the court as the trial proceeded. Bitterness increased as charges and counter-charges were exchanged between the parties, all of which received considerable attention from the newspapers.

The issues and the situation existing in January of 1938 are given their proper setting by Judge Bishop in his decision upon demurrer:[51]

> "From the findings of fact[52] filed in the case we learn that the plaintiffs were fifteen of the more than a thousand members of the defendant corporation. This corporation (to be referred to hereafter as

---

[51]As this opinion was omitted in printing the record in this court [R. 179], we present the Judge's language as our own summary of what the record shows.

[52]R. 10-25.

'Local 38-82') was a union of longshoremen operating in San Pedro and Long Beach harbors. Its exact relationship to other labor organizations mentioned does not clearly appear, but it would seem that it was granted its charter by the International Longshoremen's Association, and that it was bound by its charter or otherwise to pay a per capita tax to that parent organization and to an intermediate organization, the International Longshoremen's Association, Pacific Coast District, Local 38 (hereafter referred to as 'Pacific Coast District, Local 38'). Its articles of incorporation would lead to the conclusion that Local 38-82 received its charter from the American Federation of Labor; at all events, it was a part of that labor camp, for the International Longshoremen's Association was affiliated with the American Federation of Labor before the more recent events which gave rise to the action of Walker v. International Longshoremen's Association, District Local 38, and some representatives of employer organizations of the Pacific Coast harbor cities.

* * * * * * *

"Turning our attention again to Local 38-82, we find that along about the first of September, 1937, its officers took action which had the effect of making it a C. I. O. organization instead of one loyal to the A. F. of L. By their direction, the per capita taxes were no longer paid to the Pacific Coast District, Local 38, nor to the International Longshoremen's Association, but instead were paid to the newly appearing International Longshoremen's & Warehousemen's Union, a C. I. O. affiliate. A charter was sought from the International Longshoremen's & Warehousemen's Union. Money was voted from the treasury of Local 38-82 to pay C. I. O.

organizers in the motion picture industry. New headquarters were opened up under the auspices of the International Longshoremen's & Warehousemen's Union, and the headquarters of Local 38-82 were left an empty shell. The hiring hall, formerly operated on behalf of the longshoremen by Local 38-82, was under the management of the International Longshoremen's & Warehousemen's Union. The monthly gross income of $8,000 was gone, as no dues for Local 38-82 were being collected.

"The trial court concluded that its articles of incorporation bound Local 38-82 to the A. F. of L. and that its officers could not lawfully take the various steps which transferred its allegiance from the A. F. of L. to the C. I. O. Based on this conclusion, the trial court entered a decree[53] permanently enjoining the officers of Local 38-82, as such, from using any of the funds of Local 38-82 for C. I. O. purposes and from attempting to have any affiliation with the C. I. O. So long as they remained members of Local 38-82, the officers who were defendants were further enjoined from 'attempting to operate any meeting hall or any hiring hall for any new union of longshoremen.' It was further adjudged that the expenditures on behalf of the C. I. O. and its International Longshoremen's & Warehousemen's Union were unlawful and should be accounted for.[54] A receiver was appointed[55] to take possession of the assets of Local 38-82, collect the dues owing to it by its members, and collect the moneys illegally used for the benefit of the C. I. O. He was also directed

---

[53]R. 8-9.

[54]R. 24.

[55]R. 5, 6, 25, 34, 50.

'to participate actively in control of the San Pedro hiring hall and to carry out the working agreements through the members in good standing in said International Longshoremen's Association, Local 38-82; and to take all necessary steps to cause the International Longshoremen's & Warehousemen's Union to cease interference with the said agreements and with the control of the said hiring hall.' Immediately upon the entry of this decree and judgment a notice of intention to move for a new trial was made by the defendants affected by it."[56]

The judgment, which *inter alia* appointed a receiver, was signed and filed on January 21 and the receiver qualified on that day [R. 6]. On January 22, an order was made by the trial judge staying until January 29 proceedings in connection with his receivership order of the previous day, and on January 24, defendants filed their notice of intention to move for a new trial and a motion to vacate the judgment.

These proceedings, which took place in the period between January 21 and January 24, were thoroughly aired in the Los Angeles newspapers. Into this tense situation petitioner injected himself in a manner calculated not only to increase the bitterness then existing between the parties, but likewise in such fashion as to greatly embarrass the judge before whom that case was pending. On the very day of filing a motion to vacate the order which aroused petitioner's ire, he caused to be released for publication, under such circumstances as to leave no doubt as to his legal responsibility therefor, a telegram containing bitter criticism of the court's action. The

---

[56]R. 6, 50-51.

newspapers in Los Angeles and San Francisco published on January 24 and 25 excerpts from this telegram and explanatory comments of petitioner thereon, under headlines proclaiming "Bridges Says Court Action Means Tieup" and "Secretary Perkins Gets Warning L. A. Edict May Close Coast Ports."[57]

The published telegram[58] characterized the court's decision as "outrageous", and the court in effect was challenged to attempt enforcement of its order. In this manner petitioner unmistakably told the judge that if the court's process was made effective, not only Los Angeles County but the entire west coast could expect the closing of its harbors and complete cessation of its vast shipping industry. The court was warned that I. L. W. U., "representing over 11,000 of the 12,000 longshoremen on Pacific Coast, does not intend to allow state courts to override the majority vote of members" [R. 51]. Further, said petitioner [Pro. "Ex. 2", R. 129]:

> "The court has ruled that 12 men own the contracts. Well, then, let the 12 men load the ships * * *. We may as well understand where we stand. If they can get away with this, it means the end of unions on the Pacific Coast."[59]

All this and more, as "Pro. Ex. 2" [R. 129-31] will disclose, petitioner in the presence of the world threw into the teeth of the judge who had just entered an important order in a trial involving issues of widespread

---

[57]R. 129.

[58]R. 51.

[59]As will appear, the newspaper reporter who wrote this article verified this as a correct quotation of Bridges' statements made to him, and no denial was made by petitioner.

public interest, and to whom had been presented for calm, dispassionate and judicial consideration a motion which asked him to revoke the order and reverse himself. Parenthetically, that is exactly what the trial judge ultimately did.

The California Supreme Court summarized the effect of the published portions of the telegram as follows:

> "The published statement was not only a criticism of the decision of the court in an action then pending before said court, but was a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up. Furthermore, it contained a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision. When these statements are considered in connection with the extensive publicity that had already been given to the pending action, and the prominent position of the petitioner as the executive officer of an organization to which 11,000 longshoremen on the Pacific Coast belonged, we think that there can be no question that their publication in the metropolitan papers on the Pacific Coast, and particularly those in the county of Los Angeles in which said court was held, tended materially to affect the orderly administration of justice in the case to which reference was made and which was then pending in said court. If such would be the effect of such publication, and in our opinion, that was its effect, then the act of publishing such statements was a contempt of the court in which such action was pending" [R. 156].

Forthwith, at the presiding judge's request, investigation of the circumstances of the publication and of the

legal responsibility of petitioner was undertaken by the proper committee of the Los Angeles Bar Association, with the result that affidavits were filed charging Bridges with contempt in three counts. The first related to the filing of an affidavit by Bridges purporting, among other things, to explain said telegram [see R. 114-15], which was unfortunately omitted in printing the record herein; the second count forms the basis of the judgment now under review; and the third concerned alleged threats of strike and the holding of a short strike to intimidate the trial judge in the *Walker* case. An order directing petitioner herein to show cause why he should not be punished for contempt of court was promptly issued[60] and, having been renewed from time to time because of inability to serve him, such order was finally served.[61] Petitioner appeared and interposed a demurrer and a motion to quash. This resulted in dismissal of the first count, relating to the filing of the aforesaid affidavit. Issue was joined by verified answer as to the two remaining counts [R. 49]. The judge who issued the order to show cause, and who was alleged to have been contemned, withdrew and the case went to trial before a judge jointly selected by the parties. Petitioner upon trial was adjudged not guilty upon the third count and guilty upon the second. The trial judge imposed a small fine, stating that were he satisfied beyond a reasonable doubt that petitioner entertained a specific intent to influence or embarrass the court —the thing which his acts had an inherent tendency to bring about—the maximum penalty provided by law would be inadequate [R. 48].

---

[60]On February 24, 1938 [R. 31].

[61]Sometime between May 24, 1938, and July 13, 1938 [R. 32].

Summary of Evidence.

This brings us to a presentation of the testimony adduced at the hearing. The trial judge said:

> "He (Bridges) dictated it to his stenographer, his secretary, and told her to send it. There you have an express command. But if you do not, an express command respecting publicity, you are going to have the publicity, because of the telegram, itself. In dictating that telegram to his secretary, he did not need to tell her in words to send it, and certainly she knew when she sent the telegram what to do with a copy of it, because it was an established custom. When the copy of that telegram was put in the hands of a man who is in the organization for the purpose of giving the telegram—which is a news story in anybody's language—publicity, it was just the same as sending it directly to the newspapers. Certainly that will be my viewpoint, and I see no break in the causation there.
>
> "Now, the telegram, while we do not have the whole of it [fol. 174], I think that it is obvious that the reason that what we do have was published was that that was the colorful part of it. There is no drawing of punches in that telegram. Mr. Bridges cannot be criticized for that. Unfortunately, the wording of that telegram made it the sort of a telegram from which portions would be chosen for publication by the newspapers, and any part of it which was innocuous, was not published. The testimony is that Mr. Bridges read the whole telegram to the reporters and they chose what would make a story. It was inevitable that the portions of that telegram which were published would be published, if it were sent out and the ordinary course of affairs were carried through without interruption. Now, as in-

evitably—and there can be no argument, it seems to me, against this conclusion—that telegram, published due to its nature and due to its contents which were published, would inevitably interfere with the orderly administration of justice: not that it would cause the judge to change his mind, but it did embarrass and disturb the administration of justice and is as typical a case, it seems to me, of a contempt, as several others might be, such as the *Chronicle* case, and others. I am using the word 'inevitable' in the sense of something that follows as a matter of reason—not inevitable in that it is impossible not to be otherwise—but inevitable in that it is dead sure to occur, as the sending of the telegram under [fol. 175] the office set-up of Mr. Bridges and resulting in its publication in Southern California papers where this was a live issue" [R. 46-47].

And formally found:

"That on the 24th day of January, 1938, the defendant Harry R. Bridges dispatched a telegraphic message to Frances Perkins, Secretary of Labor in the Cabinet of the President of the United States * * *" [R. 51].

"That at or about the time of the sending of said telegram the defendant Harry R. Bridges caused a copy thereof to be given to one James D. O'Neil, for the purpose and with the intent that the contents of said telegram should, and [fol. 184] would be, furnished to, and published in newspapers on the Pacific Coast and elsewhere, and said James D. O'Neil did give said telegram to newspaper reporters, and on the 24th and 25th days of January, 1938, the portion of said telegram above set forth was published in newspapers of wide and general circulation in the cities of San Francisco and Los An-

geles, in the State of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere" [R. 52].

The California rule of review upon *certiorari* challenging a judgment of contempt was thus stated by the Supreme Court:

> "But in such a case, the review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction. The power to weigh the evidence rests with the trial court" [R. 152].
>
> "In considering the evidence before the trial court in the light of the rule just stated, it is our sole duty to determine whether such evidence is of sufficient substantiality to support the judgment of conviction, or as stated in Daily v. Superior Court, *supra* (p. 124): 'In the proceedings before us, the extent of our power is to inquire whether there was any evidence before the trial court sustaining its jurisdiction'." [R. 153.][62]

And the California Supreme Court's appraisal of the evidence is found in the following quotation:

> "The judgment in said action was rendered on January 21, 1938. The petitioner was then in San Francisco, and on January 24th, from his headquarters in that city he dictated to his stenographer a telegram to the secretary of labor and gave a copy thereof to James D. O'Neil, a trained newspaper man of more than twenty years' standing, who was in charge of

---

[62]To the same effect, see R. 134 of *Times-Mirror* case, No. 64, October Term, 1940.

the publicity bureau maintained by the petitioner as the executive officer of the C. I. O. in the city of San Francisco. O'Neil gave a copy of said telegram to one of the city papers of San Francisco and on that day and the following day that portion of the telegram set forth in the findings of the trial court was published in the metropolitan papers of the city of San Francisco and Los Angeles and elsewhere in this state.

"Upon this evidence the trial court found, 'That at or about the time of the sending of said telegram, the defendant, Harry R. Bridges, caused a copy thereto (thereof) to be given to one James D. O'Neil for the purpose and with the intent that the contents of the said telegram should, and (fol. 146) would be furnished to and published in the newspapers on the Pacific Coast and elsewhere.' It is contended by petitioner that the evidence does not support said finding. In discussing the evidence respecting the publication of said telegram, the trial court reasoned as follows: 'He (the petitioner) dictated it to his stenographer, his secretary, and told her to send it. There you have an express command. But if you do not (have) an express command respecting publicity, you are going to have publicity, because of the telegram itself. In dictating that telegram to his secretary, he did not need to tell her in words to send it, and certainly she knew when she sent the telegram what to do with a copy of it because it was an established custom. When the copy of that telegram was put in the hands of a man, who is in the organization for the purpose of giving the telegram—which is a news story in anybody's language—publicity, it was just the same as sending it direct to the newspapers.'

"(10) We are in entire agreement with the conclusion reached by the trial court in holding the pe-

titioner responsible for the publication of said telegram. Mr. O'Neil testified that he handled the publicity for the C. I. O. for the West Coast and had an office three doors from the reception room of the C. I. O. in San Francisco, and four doors from Mr. Bridges' office; that Mr. Bridges 'was news wherever he goes,' that he (O'Neil) handled the publicity of telegrams released or received by Mr. Bridges, that copies of all telegrams 'that had anything to do with the C. I. O., most of them came to my desk', and that he then determined whether any particular telegram was newsworthy and susceptible of being sent to the press for publication. We think that there can be no doubt from the testimony of Mr. O'Neil that petitioner not only had every reasonable ground to believe that his telegram would be given to the public press for publication but that the regulations of his organization made it the duty of O'Neil to see that the papers were apprised of the telegram in order that publicity might be given to its contents. In our opinion, there was ample evidence to sustain the finding of the trial court that petitioner gave to O'Neil the copy of the telegram sent to the secretary of labor with the intent that the contents thereof would be furnished to and published in the newspapers on the Pacific Coast and elsewhere." [R. 154-55.]

Not only does the record satisfy the test of review but it actually satisfies (if we were here concerned with that question) the *quantum* found by the trial judge to be present, namely, proof beyond a reasonable doubt [R. 47]. Petitioner's contention is thus reduced to one of mere error of the state courts in determining the facts or applying the local law thereto.

Authority of Bridges' Publicity Agent.

Petitioner, the record shows, is, and for some years past has been, a potent figure of national and even international proportions in that camp of organized labor known as the C. I. O. In January of 1938 he was president of the International Longshoremen's and Warehousemen's Union, an unincorporated organization with approximately 23,000 members on the Pacific Coast, and West Coast director of the C. I. O., likewise an unincorporated organization, whose membership assertedly ran into the millions. He maintained headquarters at San Francisco, and there as part of his organization, personaliy, in July, 1937, established and set up a publicity bureau. James D' O'Neil, a trained newspaperman of some twenty years' experience, was employed by petitioner as publicity agent, placed in charge of the bureau and instructed by petitioner as to the purposes which it was to serve. He testified:

> "Q. You have stated that this publicity bureau was set up, and the reason for setting it up. Under whose authority was this bureau set up and created, do you know?
>
> * * * * * * * *
>
> A. Under the authority of the director of the west coast C. I. O., Mr. Bridges.
>
> Q. And the functions of the bureau were discussed with Mr. Bridges at the time he authorized the setting up, and in fact set up the bureau, were they: that is, the purpose it was to serve? A. Yes, sir, certainly. [fol. 83.]
>
> Q. That was all discussed with Mr. Bridges? A. Yes.

Q. The mechanics as to how it was to operate was discussed with Mr. Bridges. A. He pretty much left the mechanics to me.

Q. I know, but when you were getting it set up and discussing the purposes and functions it was discussed generally with him, wasn't it? A. Not any more than in just a general way. He put me in charge and told me to run it and held me accountable." [R. 106.]

And petitioner Bridges:

"Q. With respect to communications which reach Mr. O'Neil's desk, who determines whether or not they will be [fol. 99] published and what publicity shall be given to them? A. O'Neil is given full charge. I might say we try to handle our organization that way. We don't hire a publicity expert and then tell him what to do, or have him told by people who are not publicity experts, and I am not a publicity expert." [R. 116.]

"The determination of the publicity end of it was left up to Mr. O'Neil, and I can't recollect doing anything in relation to that specific telegram." [R. 120.]

The established policy of this C. I. O. publicity bureau was that all of "the important correspondence" which O'Neil considered "to be noteworthy, or newsworthy" should be made public [R. 105], a policy adopted because of "difficulty in getting the truth about our aims and activities in the papers" [R. 105]. O'Neil was given full discretion concerning the publication of any such "newsworthy" matter [R. 100, 104]; Mr. Bridges placed no restrictions upon him [R. 102], except in the sense that

personal matters or others deemed improper for publication were not sent to his (O'Neil's) desk.

> "By that, I want to make it clear that I didn't get copies of any personal telegrams he [fol. 73] dispatched, or copies on union business, I don't get copies of those." [O'Neil, R. 100.]
>
> "A. Every day any telegrams on my desk that weren't to be released—if it wasn't to be released, it wouldn't be sent to the bureau.
>
> Q. As a matter of fact, if Mr. Bridges didn't want it [fol. 84] released, it wouldn't come to your desk? A. Not at all." [O'Neil, R. 107.]

The Preparation of the Telegram.

Having been informed by telephone of the status of the *Walker* case [R. 109], Bridges dictated the telegram in question and instructed his secretary to send it [R. 109]. The Secretary of Labor was already informed of the facts about the case.

> "The Court: So that the statement to that effect in the telegram was just reiterating a fact which they already had before them? A. Yes, I had notified them in the early part of the year. I was in Washington, D. C., and I personally notified them then." [Bridges, R. 121.]

The telegram told the Secretary nothing new; nor did it request any aid from her department. If it had, the entire context would have been voluntarily produced by petitioner's counsel.[63]

---

[63]It could not be obtained otherwise (*Ex parte Gould*, 99 Cal. 360; *Hotaling v. Superior Court*, 191 Cal. 501, 505).

The telegram said in part: "Attempted enforcement Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast." But petitioner denied that he then knew the status of the Walker litigation or that he was thinking of Judge Schmidt at all—"we weren't even thinking of the Judge at that time" [R. 117]. "At that time, so far as I was concerned, I was not giving a thought to Judge Schmidt" [R. 118]. This, notwithstanding Judge Schmidt's name appears twice in the telegram and petitioner's explanatory comment. And the language of the telegram carried a recognition of the fact that the receiver had not taken possession of the hiring hall; that the "Schmidt decision" had not yet reached the stage of "attempted enforcement" and, breathing defiance, threatened reprisal in the shape of a coastwide strike in the event of "Attempted enforcement of Schmidt decision" [R. 51].

Petitioner's Intent That Telegram Be Published.

Petitioner knew that O'Neil, the publicity agent, was to have a copy of the telegram.

> "Q. When you dictated this telegram to your secretary, that was your end? A. So far as I was concerned.
>
> Q. You knew she was going to send the telegram and give Mr. O'Neil a copy? A. Yes, sir." [R. 120.]

For "any important matters, at some time or other all go over Mr. O'Neil's desk" [Bridges, R. 115]; and this was, of course, an important matter. O'Neil testified:

> "Q. Why would the copies come to your desk, Mr. O'Neil? A. Because all the publicity for all

of the C. I. O. was cleared through my office." [R. 100.]

Bridges knew [R. 124], and so did O'Neil, that such a telegram was news which would be disseminated by the newspapers throughout the country [R. 101-3]. And it was handled like any other publicity matter [R. 104, 114].

Immediately upon receipt of his copy, O'Neil called the San Francisco News, which was about to go to press [R. 102], and was the only San Francisco afternoon paper to whom the C. I. O. gave publicity matters [R. 102-3]. He read the telegram to its representative [R. 103, 108] and it printed a short news article, found at R. 128, which did not quote the telegram.

The managing editor of the San Francisco Chronicle thereupon assigned Lawrence Resner, one of its reporters, to get the story [R. 63]. He, as a result of frequent previous contacts [R. 64-66, 73], called O'Neil, who read to him the telegram while he typed it [R. 67], this being his first knowledge of its contents [R. 71]. The Chronicle wanted further information on the story [R. 69], so Resner called Bridges [R. 69] and got from him his version of the Walker situation; it was incorporated in an article written by Resner and published in the Chronicle on the 25th [R. 67]. It says in part:

> "In further explanation of his telegram, the longshoremen's president said: 'Judge Schmidt has actually ruled that the port of Los Angeles will be tied up. This means the automatic tieup of all other ports on the Coast.
>
> "'The court has ruled that 12 men own the contracts. Well, then, let the 12 men load the ships. The court is trying to force the longshoremen to join the I. L. A., and the men aren't going to do it.

"'If the courts can decide this, it also means that the courts can rule on whether or not we have the right to strike. It means that any two or three men can protest any economic action decided upon by the majority of the membership of the union.

"'We may as well understand where we stand. If they can get away with this, it means the end of unions on the Pacific Coast. There won't be anything but company unions', Bridges said." [R. 130.]

The quotations therein contained were verified by Resner as substantially correct reproductions of what Bridges said to him [R. 70, 72, 74-6, 86, 88]; and Bridges did not refute his testimony but really incorporated it by reference into his own [R. 117].

Both Bridges and O'Neil were familiar with the process by which Associated Press members make their news material available to other members and thus automatically disseminated throughout the nation [R. 119, 101-2], which process is described at R. 59-60.

Brian Bell, news editor of the Western Division of the Associated Press, in charge of its San Francisco and Los Angeles bureaus in January, 1938, testified [R. 59-61] that the Associated Press is a news-gathering organization, that its members in January, 1938, in Los Angeles, were the Los Angeles Times, the Los Angeles Examiner, the Los Angeles Herald & Express and the Hollywood Citizen-News; that under the contractual relationship existing between the Associated Press and its newspaper members, the former had the right to use any material appearing in member papers, and that during the month of January, 1938, the Associated Press bureau in San Francisco received, in advance of publication, a copy of all stories written by member papers, one of

which was the San Francisco Chronicle. Delivery to the Associated Press of carbon copies of all news stories written by reporters on the Chronicle, taken from a hook in the Chronicle office, would occur within a few minutes after the copy had been placed upon the hook. He testified further that he saw the story that went out on the Associated Press wires from San Francisco relating to the telegram in question and that the Associated Press acquired the story from the San Francisco Chronicle at about 7:30 o'clock in the evening of January 24, the story so acquired being the one which has heretofore been identified as "Pro. Ex. 2". This story was by the Associated Press, during the evening of January 24, placed upon its wire, and went to all member papers in Los Angeles.

The major Los Angeles newspapers being Associated Press members, the quoted portion of the telegram was forthwith printed in Los Angeles on the 24th and 25th [R. 52]. Petitioner's answer admits "that the excerpts of said telegram were published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, and admits that the sending of said telegram was made public and received wide and [fol. 162] general publicity" [R. 41]. This was but the natural sequence recognized by petitioner who testified:

> "Q. And the statements which you had given to newspaper reporters in San Francisco, to your knowledge, appeared as news items in other sections of the United States? A. Yes, that is correct." [R. 124.]

And by his publicity agent, who said:

> "Q. It is a matter of fact, is it not, that Mr. Bridges has been a dominating figure in the C. I. O. throughout the United States? A. He is news, wherever he goes.
>
> Q. And any statement that Mr. Bridges makes is considered by the newspapers as being newsworthy, is it not? A. It is.
>
> Q. Was it your duty to keep before the public the activities of Mr. Bridges, and the activities of the C. I. O. during the period of time you were acting as publicity agent for the C. I. O.? A. Yes, sir." [R. 99.]

The trial judge made a finding that "the defendant Harry R. Bridges caused a copy thereto to be given to one James D. O'Neil, for the purpose and with the intent that the contents of said telegram should, and [fol. 184] would be, furnished to and published in newspapers on the Pacific Coast and elsewhere" [R. 52]. Also:

> "* * * the portion of said telegram above set forth was published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, in the state of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere." [R. 52.]

This means that it appeared in the Los Angeles Times, Los Angeles Examiner, Los Angeles Herald-Express and Hollywood Citizen News [Bell, R. 58]. The fact of the

circulation of these papers in and about the courthouse, of their being read by a large number of the fifty incumbent judges, is within the judicial knowledge of the Superior Court.

Toledo Newspaper Company v. United States is in point. The opinion of the Circuit Court of Appeals (later affirmed) had this to say on the subject (237 Fed. at 991):

> "It is urged that the record does not show that the publications were currently read by the judge of the court, or that the papers containing them were sold or distributed in the courthouse corridors, on the steps, or in the immediate vicinity of the courthouse. If these facts are essential, they may and should be presumed in support of the judgment. There is no proof to the contrary, and it is highly probable that in a city like Toledo, and with a courthouse situated as it there is, an afternoon paper, with a daily circulation of 50,000, and with five editions each day, not only is read every day by the great part of the reading public, including the judges, but is cried and sold by the hundreds and thousands under the courthouse windows, and is brought into, if not sold in, the corridors and offices of the building. We refer to these presumptions and probabilities only to indicate that the lack of precise allegation or proof as to these facts cannot, in any event, be fatal, but without intending to decide whether these facts may be necessary."

The Inherently Obstructive Quality of the Published Telegram.

Judge Bishop in his oral summary of the case expressed the view that the publication of the contents of this telegram was inevitable as a practical matter and "would inevitably interfere with the orderly administration of justice" because "it did embarrass and disturb the administration of justice" [R. 46]; and he formally adjudged that "by reason of the foregoing acts, the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court" [R. 52]. The soundness of these observations is emphasized by considerations to which the judge did not specifically refer.

Judge Schmidt could not be deemed ignorant of what everyone else in the community knew. The facts of the long, expensive and bloody coastwise strike of 1936 were so generally known that no one could ignore them. The telegram served notice of a strike of over 11,000 longshoremen on the Pacific Coast, practically all of such laborers, as an alternative to a reversal of the Schmidt ruling. The great shipping centers of the west had never recovered from the paralysis of the 1936 strike. Water commerce was still impaired and shipping companies headed for bankruptcy. With their paralysis would come that of every allied industry and perhaps, as in San Francisco in 1936, the disruption of delivery of food supplies to the cities of San Francisco, Seattle and Los Angeles. Riot and bloodshed were but reasonable incidents to expect in the event or a renewal of that strike, and upon Judge Schmidt's shoulders, as he would view it, rested

the burden of standing by his decision, of sustaining and enforcing the receivership order, of upholding the law as he construed it, on the one hand, or of yielding directly or indirectly to the pressure of adverse public sentiment which would lay at his door the sole responsibility for disrupting the commerce of the Pacific Coast, throwing thousands of men out of employment, precipitating physical violence, withholding supplies of butter, eggs, milk and what-not from the residents of large metropolitan centers. Such a prospect, facing the judge unless he changed his ruling or otherwise receded from the receivership, was bound to embarrass and to unconsciously influence him in one direction or another.

> "But it is folly to deceive ourselves and it is futile to attempt to deceive others. Threats of public clamor have before now swayed the judgments and flexed the purposes of resolute men, and it will be well to remember that what has happened may recur. Men have in the past yielded to the demands of an angry populace, and it is quite possible that they may yield again. Moral fiber is not stronger now than it ever was before." (*State v. Bee Publishing Company*, 60 Neb. 282; 83 N. W. at 206.)
>
> "A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice." (*In re San Francisco Chronicle*, 1 Cal. (2d) at 637.)

Judge Schmidt ultimately reversed himself in this matter and no man, not even the judge, will ever know the degree of influence which the knowledge of Bridges' threat had upon him.

VIII.

Petitioner Has Not Been Denied His Constitutional Right to Petition the Government for a Redress of Grievances.

Counsel, in Point I of the brief, state the point in dual fashion, as a denial of "freedom of speech and of the press" and of "the right to petition the Government for a redress of grievances" (Br. p. 25). The reason for this will become clear as the discussion proceeds.

The Telegram Was Not a Petition for Redress.

Petitioner's whole argument rests upon a gratuitous assumption. There is no basis in the record for asserting that the Bridges' telegram to Secretary Perkins was a petition for redress. Indeed, counsel for petitioner, at brief page 30, merely claim that Bridges, having been requested by Federal authorities "to advise such agencies of situations that endangered industrial peace", entertained the "sole purpose * * * to comply with such request and to advise these governmental agencies of a situation which, in his opinion, required the assistance of these Federal departments".

The telegram is quoted at R. 51 and, looking to the future, says: "Attempted enforcement of Schmidt decision will tie-up Port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override

the National Labor Relations Board". The Secretary is given no new facts, for she was already informed.

> "The Court: So that the statement to that effect in the telegram was just reiterating a fact which they already had before them? A. Yes, I had notified them in the early part of the year. I was in Washington, D. C., and I personally notified them then." [Bridges, R. 121.]

The telegram manifestly assumed knowledge on her part of the decision; it asked or petitioned for nothing at her hands. It merely breathed defiance of the Superior Court in case of "Attempted enforcement of Schmidt decision", which by the terms of the wire was shown to be an unexecuted order, the plain implication being that the receiver had not yet taken possession of the hiring hall. The inescapable inference is that the balance of the telegram would have been produced by petitioner if in fact it resembled a petition for redress of grievances in any respect (see authorities at pp. 28-29 of our former brief).

Petitioner's counsel describe the telegram as one "protesting against the decision of a local judge" (Br. p. 25), expressing Bridges' belief "that the union was aggrieved by the decision" (Br. p. 31), and "communicating such grievance to the appropriate Federal governmental agency" (Br. p. 31). He does not attempt to define the nature of the petition which he claims to have been implicit in the telegram, nor the sort of "redress of grievances" which it is claimed to have sought.

And the assertion that the Secretary of Labor was "the appropriate federal governmental agency" to redress the grievance of an erroneous state court decision is doubly

erroneous in that it assumes a right in the Federal Government to redress grievances growing out of state court errors and that it implies a right in the Executive Department to interrupt and divert the flow of the stream of justice. If there be attributed to this telegram any purpose whatever concerning the Secretary of Labor, it would be the urging of an unlawful thing upon her,—interference of some kind in the pending state court case. She had no legitimate function to perform with respect to it.

Although the California Supreme Court held that the state court was acting within its jurisdiction in the *Walker* case [R. 160] and had not been ousted through the pendency of a proceeding before the National Labor Relations Board, it is actually immaterial whether that conclusion is correct. If in fact Judge Schmidt was acting in excess of his jurisdiction, the proper place to establish that conclusion was in his court or upon appeal or through special writ such as prohibition, challenging his jurisdiction (*Gompers v. Buck's Stove & R. Co.*, 221 U. S. 419, 450; *United States v. Shipp*, 203 U. S. 563, 572; *United States v. Toledo Newspaper Co.*, 220 Fed. 458, 494-5 (D.C.); *United States v. French*, 9 Fed. Supp. 30, 31-32 (D.C. Mich.); *Russell v. United States*, 86 Fed. (2d) 389, 392 (8th C.C.A.); *Howat v. Kansas*, 258 U. S. 181, 189).

The Secretary of Labor had no right to expostulate with the trial judge concerning these pending matters; she possessed no power to interfere with the receiver's taking possession or conducting the hiring hall. Indeed, no Federal official at that stage of the case had any lawful right to physically obstruct execution of the state court's process. The *res* was in its custody, at least constructively. And if the Federal Government were to interfere, it could be only

through the interposition of the courts, not the executive branch. Even if it were to be conceded that the Labor Board had exclusive jurisdiction in the premises, the Secretary had no right to interfere directly or indirectly with the state court proceeding.

Mr. Fraenkel's *amicus curiae* brief suggests, at page 8, that it was proper for the Secretary of Labor to bring into play "her various agencies of mediation and conciliation", which can mean only an endeavor to compose the differences between the litigants and thus bring about a lawful disposition of the litigation. If a request for this were assumed to be the purport of the telegram, it would still fall far short of a petition for redress of grievances, for it would amount to an invitation to her to prevail upon the parties to forget, not to redress, the grievance.

"The tyranny of labels * * * must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other."[64] The mere assertion that this telegram was a petition for redress of grievances cannot be accepted at bar. For this liberty, like its cognate ones—rights of assembly, free speech and free press,—is to be viewed and construed in the light of its historic connotation.[65]

---

[64]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. at 323.

[65]See: *U. S. v. Cruickshank*, 92 U. S. 542, 552; *De Jonge v. Oregon*, 299 U. S. 353, 364; *Hague v. Com. for Industrial Organization*, 307 U. S. 496, 516, 522; *State v. Butterworth*, 142 Atl. 57, 58 (N. J.).

The Historical Connotation of the Right to Petition for Redress of Grievances.

It is everywhere conceded that the right is not absolute, for, as Mr. Fraenkel says (p. 1) "no rights are absolute", and Mr. Wirin (Br. p. 33): "That there are limits to the exercise of the right to petition, as to all rights, constitutional or otherwise, is not denied."

And clearly the exercise of the right, in order to avoid abuse, must have some legitimate relation to the recognized object of its exercise; that object does not and never has been the influencing of pending court causes. The normal field for operation of this liberty is the influencing of the legislative or executive branch of Government. In the *Cruickshank* case the court refers to the "right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances", and in the *Hague* case Mr. Justice Stone referred to "the right of citizens to assemble for the purpose of petitioning Congress for the redress of grievances" (p. 522).[66]

We apprehend that the right of petition is not necessarily limited to addressing the legislative body; that it would be a proper method of advocating a pardon by the executive or a change in the rules of one of his administrative agencies or the exercise of his veto power concerning legislation. But historically and on principle the right of peti-

---

[66]The guarantee of the California Constitution is: "The people shall have the right * * * to petition the legislature for redress of grievances" (Art. I, Sec. 10).

tion (in the sense of a petition by members of the public for redress of grievances or change of any existing state of affairs) has never applied to the courts and cannot be held so to apply. Just as speech which tends to influence a pending cause is an abuse of "free speech" and a newspaper publication having the same tendency is a violation of the freedom of the press, so a petition for grievances which is directed at the court rather than the legislature or the executive is an abuse of that liberty.

The historic conception of this right at the time of adoption of our Constitution and our Bill of Rights was such as to clearly show a limitation to executive and legislative matters.

During the fourteenth and into the fifteenth century petitions for redress of grievances were handled by Parliament itself, but the flood of unanswered petitions became so great that "The Lords * * *, in the fifteenth century, * * * pursued the only possible course, and turned them over to the Council. Thus the greater part of the jurisdiction which the Lords had grasped at, but could not hold, was abandoned to the officials who composed the Council; and, in the sixteenth century, it was divided between the Council, the Star Chamber, and the Chancery."[67] Until this transfer of jurisdiction, such petitions had pertained to private grievances as well as public. But the Court of Chancery gradually absorbed the handling of petitions relating to private wrongs, which became redressable through petition in equity at the instance of the aggrieved party and none other. This practice is the forerunner of our modern petition or bill in equity and had become stabil-

---

[67]1 Holdsworth's History of English Law, p. 359.

ized long before American independence. At that time, the redress of private grievances having been delegated to the courts and the courts alone, the battle over the right of petition for redress of grievances, which was still raging in England, had narrowed into a battle over the right to address Parliament concerning legislative and executive matters.[68] Hence the guaranty incorporated in the Federal Constitution (and in the basic law of certain original states) was directed to the preservation of petitions to the legislature and the executive. Petitions relating to the redress of private wrongs had been adequately cared for through the recognition of the petition in Chancery filed and pursued by the aggrieved party and by him alone, a practice which had proved eminently satisfactory,—one which merges itself into the related doctrine of independence of the courts, likewise impliedly carried into the Federal Constitution.

The Only Permissible Petitions Affecting Pending Court Causes Are Those Prescribed for Use of the Parties.

The time-honored vehicle for redress of judicial grievances—errors of fact or law committed against a litigant—is the motion for new trial or rehearing, the prosecution of an appeal, or the seeking of an extraordinary jurisdictional writ such as prohibition, certiorari and the like. But what petitioner did was to publicly tell the Secretary of Labor (on the day of filing the motion for new trial) that dire consequences would follow any attempt to enforce the Schmidt receivership order. Counsel say this message was "a protest against the decision" (p. 25) and a notice

---

[68]Holdsworth, pp. 370-372; 1 May on The Constitutional History of England, pp. 349-354.

to the public of "what steps were being taken to prevent a possible tie-up of shipping" (Br. p. 32), and to what end? Not to procure legitimate redress of the alleged grievance. If the correction of the decision was, as intimated, the objective, then petitioner was invoking or suggesting some indirect process, one not sanctioned by the law. Is this sort of correction of judicial error "implicit in the concept of ordered liberty"?[69] "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining v. New Jersey*, 211 U. S. at 106). Clearly not.

The matter is well stated in 11 *Am. Jur.*, p. 1120, Sec. 325:

> "The right of petition, on the other hand, natural and inherent though it is, has never been invoked to shatter the standards of propriety entertained for the conduct of courts. Throughout the many centuries that the right of petition has been recognized, it has never been considered that a court may be properly approached by a petition to make a specific disposition of a cause pending before it. While the state Constitution protects and preserves the right of petition, it is the right as it was known and exercised at the time of adoption of the Constitution. That right never included the right to attempt to influence the decision of a court through the medium of a petition. *Petitions which have been established as part of judicial procedure are the only ones protected by the constitutional right so far as the courts are concerned.*

---

[69] *Palko v. Connecticut*, 302 U. S. at 325.

"The right to petition is not completely unlimited. Like all other constitutional rights, it is subject to reasonable regulations to preserve and protect the general welfare. It is no more sacred than the right of free speech, and as there may be an abuse of the right of free speech, so may there be an abuse of the right of petition."

In re Stolen, 193 Wis. 627, is cited in support of these principles and fully supports the same. The Supreme Court of Wisconsin had under consideration the disbarment of a certain attorney (one Stolen) who had resigned his office as judge. While "matters pending before the court for adjudication were questions of fact presented by the evidence contained in the report of the referee", a petition was presented to the court by sixty attorneys who sought leniency for Judge Stolen. The Supreme Court concluded that the document was a petition and not a brief and the signatories themselves asserted it to be such and claimed the right to thus address the court concerning a pending matter. The court said at page 629:

"It is a traditional conviction of civilized society everywhere that courts and juries, in the decision of issues of fact and law, should be immune from every extraneous influence; that facts should be decided upon evidence produced in court; and that the determination of such facts should be uninfluenced by bias, prejudice or sympathies."

At page 631:

"But it is said that the Constitution of this state, by section 4 of article I, provides that the right of the 'people * * * to petition the government, or any department thereof, shall never be abridged.'

It is said that the judiciary is a department of the government, and that the right to petition a court is therefore guaranteed by the Constitution. We concede without further discussion that the judiciary constitutes a department of the government. The provision of the Constitution, however, is that the right to petition shall never be 'abridged'. This language does not confer any new right, but secures existing rights."

After quoting from *United States v. Cruickshank*, the court continued:

"The right of petition may be conceded to be an inherent right of the citizen under all free governments. This right has existed side by side with that standard of conduct set up and observed by the judgment of civilized peoples that courts shall decide causes only upon sworn testimony produced in court, to which shall be applied principles of law applicable to the situation. The right of petition, natural and inherent though it be, has never, so far as we can discover, been invoked to shatter the standards of propriety entertained for the conduct of courts. Throughout many centuries the right of petition has been recognized, but it has never been considered that a court may be properly approached by a petition to make a specific disposition of a cause pending before it. While our state Constitution protects and preserves the right of petition, it is the right as it was known and exercised at the time of the adoption of the Constitution. That right shall never be abridged. That right, however, never included the right to attempt to influence the decision of a court through the medium of a petition. In fact, as the jurisdiction of courts expanded, the necessity for petitioning the government grew less. In an article

on this subject, to be found in volume XXI, Encyclopaedia Britannica, it is said:

"'Petitions to the Crown appear to have been at first for the redress of private and local grievances, or for remedies which the courts of law could not grant. As equity grew into a system, petitions of this kind not seeking legislative remedies tended to become superseded by bills in chancery.'

"Thus far our discussion has related to petitions as popularly understood. There is a class of petitions which may properly be addressed to courts. They are petitions which conform to the ordinary course of judicial procedure and serve to arouse the jurisdiction or action of the court upon justicable matters. This very proceeding was instituted by a petition signed by the officers of the Dane County Bar Association. That petition aroused the jurisdiction, or action, at least, of this court in the premises. Petitions which have been established as a part of judicial procedure may be presented to courts, and such petitions are the only ones protected by the constitutional provision here invoked."[70]

The Telegram Is to Be Measured by the Free Speech Guaranty, Not That Relating to Petitions for Redress.

Counsel for petitioner show at brief pages 26-27 that a petition for redress, an actual one, possesses a qualified privilege in the law of libel, but only a qualified one.

---

[70]*Cf. In re Arnold*, 204 Cal. 175.

Thus counsel again concede that the right may be abused. And if the document which they assert to be a petition was not in fact one (as clearly appears here), if it was but a public protest against a decision, or a public statement of what measures were being taken to redress the grievance inhering in the erroneous ruling, or a mere request to the Secretary of Labor to procure mediation between the parties to the cause, or anything other than a petition for redress directed at some legislative or executive grievance, the document stands on the same plane as any other utterance, oral or written; it must be tested by the rules of free speech rather than the rules of petition for redress of grievances.

And so it will not do to say that the right to communicate with the Secretary of Labor necessarily connotes a right to publish all that is said to her. The message to her might well be privileged as a matter of general law, but its voluntary publication by the sender would destroy that immunity.[71] Publicity was not necessary to moving the Secretary to employ her functions as mediator. Indeed, she had requested that Bridges communicate by telephone or through some of her local representatives [Bridges, R. 110].

Mr. Hotchkiss, of the Los Angeles Times, may discuss freely his opinion pertaining to pending proceedings and what the ultimate disposition should be; but he cannot discuss them with the judge; nor can he send a mes-

---

[71]36 *C. J.*, Sec. 219, p. 1248; 17 *R. C. L.*, Sec. 90, p. 344.

senger or a letter or telegram to communicate those views to the judge. By the same token, he cannot publish them under circumstances which will probably carry those sentiments into the judicial chambers of their own momentum—as in his widely-circularized metropolitan newspaper. And Mr. Bridges, while he may freely express his sentiments concerning the Schmidt decision to Secretary Perkins and to his own followers, cannot do so in the presence of the judge or in such manner as to be calculated to invade his deliberations upon pending matters. The California Supreme Court pointed out that: "It was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty." And Judge Bishop placed his ruling on the same ground [R. 46-47].

The claim of a right or duty to inform all members of the union and the general public of "what steps were being taken to prevent a possible tieup of shipping" (Br. p. 32) presupposes that the telegram was in fact a petition. But this document was neither a petition in fact, nor was it intended to operate in any field where influence by petition is lawful; for many centuries it has been unlawful to thus influence the proceedings of a court of justice.

Applied to the instant telegram the argument for publicity is on a parity with that of the Los Angeles Times, which considers itself "qualified to give an informed

opinion" [R. 52, No. 64], as "a leader of community thought and action" [R. 44]. The Reverend Bob Shuler, believing that he had a call to reform the City of Los Angeles:

> "* * * became deeply and actively interested in the awakening, arousing and in forming a state of public opinion with relation to the offenses with which the aforesaid persons had been charged and with respect to the proper prosecution of said offenses. The petitioner was accustomed during said period to make use of the radio, through one of its largest broadcasting stations in that region, in order to give widespread publicity to his opinions and utterances upon whatever subjects he sought by such means to discuss, particularly upon the subject of the public scandal which had arisen by reason of the alleged criminal acts of the defendants in said original actions and of said officials in connection with the prosecution of the same; and it may not be denied that the petitioner herein had acquired and occupied a very large sphere of influence in the way of arousing, directing and leading public opinion with respect to said conspiracy and with respect to said officials who had been charged and who have been convicted of accepting bribes with a view to defeating public justice in the pursuit and conviction of the persons charged with said conspiracy." (210 Cal. at 383.)

The editor of the Toledo News-Bee believed that his "publications complained of related to a matter of public concern and were safeguarded from being made the basis

of contempt proceedings by the assuredly secured freedom of the press" (247 U. S. at 419). But the courts have held, and rightly, that this urge to convey an effective message to the public does not excuse utterances which have a direct tendency to interfere with the functioning of the judiciary and, hence, to impair its independence, a tendency to pollute the purity of the stream of justice.

The court should not lose sight of the fact that petitioner's conviction rests not upon the fact of telegraphing the Secretary of Labor, and not upon the *mere* fact of publication, but on the circumstance that the publication was made at such time and place and in such manner as to have an inherent tendency to interfere with the deliberations of the judge upon a pending judicial matter.

Petitioner's argument concerning the alleged invasion of federal authority is somewhat far fetched, for no federal agency has any right to interfere with state court proceedings except as it invokes the judicial processes of the federal courts in federal matters. No federal official is being prosecuted and, hence, discussion of his or her right to give publicity to the telegram after its receipt is beside the mark. Mr. Bridges does not personify or represent the federal government; he was not petitioning it; he was giving publicity on the doorstep of the court house to a tirade against the court's decision and to threats of dire consequences if the decision were not revoked. No principle of constitutional law sanctions that.

IX.

The Right of Petitioner to Pursue a Lawful Occupation Has Not Been Denied or Impaired.

Petitioner's argument proceeds upon the false assumption of a necessity of pure democracy in a labor union—a fiction. Petitioner contends not only for a democracy but for one which keeps each member fully informed on all matters and inferentially gives him a voice in it. Again we say the assumption and assertion is pure fiction. Mr. O'Neil, the C. I. O. publicity agent, testified:

> "By that, I want to make it clear that I didn't get copies of any personal telegrams he [fol. 73] dispatched, or *copies on union business,* I don't get copies of those" [R. 100].
>
> "A. Every day any telegrams on my desk that weren't to be released—if it wasn't to be released, it wouldn't be sent to the bureau.
>
> Q. As a matter of fact, if Mr. Bridges didn't want it released, it wouldn't come to your desk? A. Not at all" [R. 107].

And petitioner Bridges:

> "Well, we have many labor disputes come up; we might have a dispute in the northwest and I might wish them to adopt a certain kind of strategy against the employers; for example, well, we don't turn this over to Mr. O'Neil directly, but we turn it over in some other way. *We don't expose the matter to our employers. So these matters would not be published* and O'Neil knows that, and communications of that type would be sent to him for his information; not for publication, so he is informed at all times" [R. 115].

But if it were deemed by the union or its leader to be desirable to make public to its members through the newspapers all matters pertaining to the union, that would not be the measure of their right. Hotchkiss, Shuler and Cochran (Toledo News-Bee editor) thought that their position as leaders in the community made it highly desirable to disseminate their views to interested persons, but they ran into the barrier between free speech and its abuse. And it was definitely established as to two of them (and should be as to Hotchkiss) that one cannot set his own boundaries to free speech, and that he abuses a conceded liberty when he speaks at such time and in such manner as to probably inject extramural influences into judicial deliberations.

Counsel again proceed upon a forced and erroneous predicate when they say that the judgment at bar "penalizes the petitioner for a legitimate act in the exercise of his lawful occupation" (Br. p. 37). For the penalty assessed to petitioner was not imposed for a lawful act. He is not to be punished for sending the telegram or for the *mere* publication of it, but for the doing of the act in such a manner as to render it unlawful because of its inherent tendency to interfere with the court.

The cases cited by petitioner[72] uphold as a fundamental liberty the right to engage in a lawful occupation, but they do not hold or intimate that each laborer can define the legitimate scope of his own activities[73] or that the liberty can be permitted to invade the independence of

---

[72]*Truax v. Raich*, 239 U. S. 33, 41; *Meyer v. Nebraska*, 262 U. S. 390, 399.

[73]See: 16 *C. J. S.*, Sec. 212, pp. 625-7; 6 *R. C. L.*, Sec. 252, p. 267.

the courts any more than the right of free speech or free press or petition for grievances.

Counsel observe at page 37: "To say that a person may engage in an occupation and at the same time make it criminal for him to perform the acts required thereby is in effect to completely nullify the constitutional right to engage in that occupation at all." This merely argues that some of the activities which petitioner considers essential to his vocation are unlawful; that he would have the court ignore the settled distinction[74] between forbidding a lawful occupation and regulating its conduct.

Trade unions and the vocation of labor leader grew up long after these principles were developed with respect to other lawful occupations. Neither the unions nor their leaders have exemptions from the restraints applicable to all other vocations. Like the publisher of a newspaper, the labor leader "has no special immunity from the application of general laws. He has no special privileges to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court."[75]

> "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator * * * or an anarchist * * * the right and the limitation thereof being the same when the matter involved in the utterances of all or any of these affects or manifestly tends to affect the orderly administration of

---

[74] *Adams v. Tanner*, 244 U. S. 590.

[75] *Associated Press v. National Labor Rel. Bd.*, 301 U. S. at 133.

justice in pending causes before judicial tribunals and the judges thereof." (*In re Shuler*, 210 Cal. at 402.)

Contempt of court by a labor leader is a contempt of court as much as any other. The exercise of his prerogatives can no more be used to influence the disposition of pending causes than can the "freedom of the press" of the Los Angeles Times. The Supreme Court of California adequately disposed of this contention in the language found at R. 160.

It is submitted that no good ground for *certiorari* has been shown, that the writ should be dismissed; that the judgment herein should be affirmed in all respects.

Respectfully submitted,

WM. B. MCKESSON,
Deputy County Counsel.

ALLEN W. ASHBURN,

MICHAEL G. LUDDY,

By ALLEN W. ASHBURN,
Attorneys for Respondent.

Of Counsel:

ARNOLD PRAEGER,

J. H. O'CONNOR,
County Counsel.

DOUGLAS DECOSTER,
Chief Deputy County Counsel.

S. V. O. PRICHARD,
Assistant County Counsel.